Supreme Court, U.S.
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No.

In the Supreme Court of the United States

SYLVESTER PALMER,
Petitioner.

versus

TRANSIT MANAGEMENT SOUTHEAST LOUISIANA (TMSEL) REGIONAL TRANSIT AUTHORITY; REGIONAL TRANSIT AUTHORITY; AMALGAMATED TRANSIT UNION, DIVISION 1611; UNIDENTIFIED PARTY
Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Shawn D. Sentilles
Counsel of Record
LOBRANO & LOBRANO, L.L.C.
Post Office Box 208
Belle Chasse, Louisiana 70037
(504) 433-3100
Attorneys for Petitioner

6/pp

QUESTIONS PRESENTED

I. WAS IT ERROR FOR THE DISTRICT COURT TO DISMISS PALMER'S CLAIM FOR BREACH OF CONTRACT WHERE TMSEL FAILED TO COUNTER PALMER'S ALLEGATIONS THAT DESPITE HIS SENIORITY, HE WAS DENIED OPPORTUNITIES TO TRANSFER BACK TO A UNION POSITION AND THAT EMPLOYEES WITH LESS SENIORITY WERE TRANSFERRED TO APPLICABLE UNION POSITIONS?

II. WAS IT ERROR FOR THE DISTRICT COURT TO GRANT TMSEL'S MOTION FOR SUMMARY JUDGMENT WHEN MATERIAL QUESTIONS OF FACT REMAINED AS TO WHETHER PALMER SUFFERED GENDER DISCRIMINATION AND ADVERSE EMPLOYMENT ACTIONS?

III. WAS IT ERROR FOR THE DISTRICT COURT TO DISMISS PALMER'S ERISA CLAIM ON SUMMARY JUDGMENT WHERE A GENUINE ISSUE OF MATERIAL FACT REMAINS AS TO WHETHER TMSEL INTENDED TO INTERFERE WITH PALMER'S ERISA BENEFITS?

PARTIES TO THE PROCEEDING

Sylvester Palmer – Plaintiff

Transit Management Southeast Louisiana Regional Transit Authority – Defendant

Regional Transit Authority – Defendant

Amalgamated Transit Union, Division 1611 – Defendant

Unidentified Party – Defendant

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 10

I. IT WAS ERROR FOR THE DISTRICT COURT TO DISMISS PALMER'S CLAIM FOR BREACH OF CONTRACT WHERE TMSEL FAILED TO COUNTER PALMER'S ALLEGATIONS THAT DESPITE HIS SENIORITY, HE WAS DENIED OPPORTUNITIES TO TRANSFER BACK TO A UNION POSITION AND THAT EMPLOYEES WITH LESS SENIORITY WERE TRANSFERRED TO APPLICABLE UNION POSITIONS 10

II. IT WAS ERROR FOR THE DISTRICT COURT TO GRANT TMSEL'S MOTION FOR SUMMARY JUDGMENT WHEN MATERIAL QUESTIONS OF FACT REMAINED AS TO WHETHER PALMER SUFFERED GENDER DISCRIMINATION AND ADVERSE EMPLOYMENT ACTIONS 16

A. PALMER'S CLAIM FOR GENDER DISCRIMINATION. 16

B. PALMER'S CLAIM FOR RETALIATORY FIRING. 21

C. PALMER'S LOUISIANA STATE LAW CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS 23

III. IT WAS ERROR FOR THE DISTRICT COURT TO DISMISS PALMER'S ERISA CLAIM ON SUMMARY JUDGMENT WHERE A GENUINE ISSUE OF MATERIAL FACT REMAINS AS TO WHETHER TMSEL INTENDED TO INTERFERE WITH PALMER'S ERISA BENEFITS 24

CONCLUSION 29

APPENDIX

FIFTH CIRCUIT COURT JUDGMENT 1a

FIFTH CIRCUIT COURT OPINION 3a

EASTERN DISTRICT OF LOUISIANA COURT JUDGMENT, JANUARY 18, 2000 . . . . . 7a

EASTERN DISTRICT OF LOUISIANA COURT ORDER AND REASONS, JANUARY 18, 2000 8a

LOUISIANA REVISED STATUTE 23:890 . . 22a

TABLE OF AUTHORITIES

CASES

Alabama Great So. R.R. (Co.) v. Louisville & N.R.R. (Co.,) 224 F.2d 1, 5, 50 A.L.R. 2d 1302 (5th Cir. 1955) 27

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510 (1981) 24

Barrow v. New Orleans Steamship Association, 932 F.2d 473 (5th Cir. 1991) 21

Burlington Indus., Inc. v. Ellerth, 524 U.S. 7742, 761, 118 S.Ct. 2257, 2268 (1998) 17

Clark v. Resistoflex Company, A division of Unidyanamics Corporation, 854 F.2d 762, 770 (5th Cir. 1988) 25

Consolidated Electric Co. v. United States for Use and Benefit of Gough Industries, 9 Cir. 1966, 355 F.2d 437, 438, 439 28

Dewitt v. Penn-Del Directory Corporation, 106 F.3d 514, 522-23 (3rd Cir. 1997) 25

Farmer v. United Brotherhood of Carpenters, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977) 23

Gavalik v. Continental Can Company, 812 F.2d 834, 851 (3rd Cir.), *cert. denied*, 484 U.S. 979, 108 S.Ct. 495 (1987) 25

Hardin v. Pitney-Bowes, Inc., 451 U.S. 1008 (1981) 28

International Shortstop, Inc., and Sam Talkington v. Rally's, Inc., 939 F.2d 1257 (5th Cir. 1991) 27

Poller v. Columbia Broadcasting Company, 1962, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 28

STATUTES

Louisiana Revised Statute 23:890(C) 2, 10, 11, 12, 14, 15, 16

29 U.S.C. Section 1140 ..... 2, 24, 25

OTHER

6 Moore's Federal Practice, 2d ed., para. 56.17 (41.-1) 28

3 Barron & Holtzoff, *Federal Practice & Procedure*, 1967 PP., § 1232.2 28

OPINIONS BELOW

The August 21, 2000 Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit in this case is unreported and is set forth in the Appendix hereto (App. 1a and 3a).

The January 18, 2000 Judgment and Order and Reasons of the United States District Court for the Eastern District of Louisiana in this case is reported at 2000 U.S. Dist. Lexis 401 and is set forth in the Appendix hereto (App. 7a and 8a).

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Fifth Circuit affirming the decision of the District Court for the Eastern District of Louisiana was entered on August 21, 2000. This petition for writ of certiorari was filed within ninety days from the entry of the judgment. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Louisiana Revised Statute 23:890(C):

> Whenever a municipality, transit authority, or other authority organized for the purpose shall acquire an existing public transportation system, all of the employees of such system to the extent necessary for the operation thereof, except executive or administrative officers and employees, shall be transferred to and appointed as employees of the said municipality, transit authority or other authority and these employees shall be given sick leave, *seniority*, vacation and pension credits in accordance with the records of the acquired system.

Section 510 of ERISA, 29 U.S.C. § 1140:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the

purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

STATEMENT OF THE CASE

In 1978, petitioner Sylvester Palmer ("Palmer") was hired as a bus driver, a union position, by New Orleans Public Service, Inc. ("NOPSI"). NOPSI was a private corporation with responsibility for operation of the mass transit system of New Orleans. On July 1, 1983, Regional Transit Authority ("RTA") contracted with the City of New Orleans to assume responsibility for operation of the mass transit system formerly operated by NOPSI. RTA is a political subdivision of the State of Louisiana. Transit Management of Southeast Louisiana, Inc. ("TMSEL") is contractually responsible for the management and day-to-day operation of RTA's transit system. TMSEL is a wholly owned subsidiary of NTS, a

private corporation (RTA and TMSEL hereinafter referred to collectively as "TMSEL").

When TMSEL assumed the operations of NOPSI in 1983, Palmer was retained as a union employee of TMSEL. Representatives of Palmer's union and TMSEL told Palmer that as a union member and a former employee of NOPSI, he would be protected from layoffs and in fact could not be laid off.

During the period pertinent to this action, TMSEL and Palmer's union, Amalgamated Transit Union, Division 1611, entered into two separate collective bargaining agreements. The first agreement was effective August, 1991 to July, 1994. The second agreement was effective August, 1994 to January, 2000. The agreements preserved the seniority rights of union members, and protected them from layoffs.

From March, 1981 to June, 1990, Palmer served as a "Run Dispatcher," a union position in the Transportation Department. On June 7, 1990, Palmer was promoted to "Instructor," a union position in the Transportation Department.

On October 6, 1995, TMSEL transferred Palmer from the union position of Instructor in RTA's Transportation Department to the non-union position of "Assignment Supervisor" in RTA's Maintenance Department. Palmer did not voluntarily consent to the loss of his union position. Along with Palmer, three male Instructors and one female Run Dispatcher, Dale Newman, were also transferred to RTA's Maintenance Department. However, TMSEL allowed James St. Charles, an Instructor over whom Palmer had seniority,

to remain in the Transportation Department. Palmer contends that retaining St. Charles in the union position rather than Palmer violated the seniority provisions of the contract entered into between Palmer's union and TMSEL. On October 6, 1995, TMSEL provided Palmer's union with a letter outlining the terms of Palmer's transfer and stating that Palmer would be given priority to transfer back into the Transportation Department if an opening became available.

From the time of his October, 1995 transfer to a non-union position until March 1, 1997, when Palmer was laid off, TMSEL subjected Palmer to a series of unfair labor practices. These practices denied Palmer the opportunity to return to the union position of Instructor in RTA's Transportation Department. By unfairly denying Palmer the opportunity to return to his union position, TMSEL ultimately secured the discharge of Palmer, depriving Palmer of significant benefits that he had accrued during his 19 years of service.

After being transferred to the Maintenance Department, Palmer noticed that his seniority rights were being violated. In particular, he noticed that management was giving preferential treatment to Newman, a female, with regard to selection of work schedules and vacation time. Palmer had seniority over Newman. Palmer believed that management was giving Newman favorable treatment because of her gender.

On October 13, 1995, Palmer filed an internal grievance wherein he complained that his seniority rights were being violated because Newman received better shift assignments and vacation schedules

following their reassignment to the Maintenance Department. Palmer complained that his lateral transfer deprived him of the benefit of seniority in the selection of work schedules and vacation time. On or about October 13, 1995, Palmer met with Mr. Leroy Bailey and other representatives of TMSEL to address his grievance. During the meeting, Bailey told Palmer that he did not like employees filing grievances and that he did not care about seniority "because we place employees where we want to put them." The meeting terminated with a verbal assurance that Palmer's seniority would be restored.

Following the October 13, 1995 meeting, management continued to subject Palmer to constant shift changes, cancellation of vacation days, and denial of sick days. Palmer alleges that he also received sub-standard evaluations for the first time since he was originally hired by NOPSI in 1978.

In December 1995, Newman was transferred back to the Transportation Department as a run dispatcher. Palmer believed that when Newman was transferred back to the Transportation Department, he was being discriminated against because of his gender.

In January 1996, Palmer heard his supervisor, Mr. Jerome Beasley, tell Frances Bowie, an employee with less seniority than Palmer, that he knew she was dissatisfied with being transferred to the Maintenance Department and promise Bowie that she would be transferred back to the Transportation Department by the end of 1996. On December 30, 1996, Bowie was transferred back to the Transportation Department to the position of "Senior Run Dispatcher." At the time of

her transfer back to Transportation, Bowie had no experience as a Run Dispatcher. TMSEL did not notify Palmer about the position of Senior Run Dispatcher. Payroll records showed that Bowie's salary was raised from $14 to $16 per hour. Although Bowie's payroll record clearly states $16 per hour, TMSEL disputed the fact that Bowie received a raise in salary. Ms. Bowie's payroll authorization forms indicated that her pay raise upon transfer was not prepared or filed until August 8, 1997.

Palmer alleged that on March 20, 1997, his supervisors, Mr. Barnes and Mr. Truxillo, told Palmer that he would be moved to the position of "Lot Dispatcher" beginning March 24, 1997. The next day, Barnes and Truxillo informed Palmer that he would not be moved to Lot Dispatcher because Bailey had denied the move.

On March 31, 1997, TMSEL laid off Palmer and twenty-eight other employees as a result of a reduction in force. On that date, Palmer met with Beasley, who informed Palmer that he was being terminated for lack of job knowledge and disciplinary procedures. Of these 28 employees who were laid off, Palmer was the only one who had formerly worked for NOPSI.

The Lot Dispatcher position that had been offered to Palmer on March 20, 1997 and rescinded on March 21, 1997 was not affected by the March 31, 1997 reduction in force. Although Palmer had 19 years of service with TMSEL at the time he was laid off and needed only one more year of service to fully vest in the

RTA pension plans, the position of Lot Dispatcher was not offered to Palmer.

On June 9, 1997, Palmer filed a charge of discrimination with the Louisiana Commission on Human Rights. Palmer's charge, which was filed on a standardized charge form, related to events occurring between January 1, 1997 and March 31, 1997. Palmer's charge stated:

> [i]n 1/97 my work shift was changed. In 1/97 I was denied transfer back to the Transportation Department. On 3/31/97 I was discharged from my position as an assignment supervisor earning $14.15 per hour. There are about 1,200 employees at the company.
>
> No reason was given for the shift change or transfer. Jerome Beasley, Superintendent of Maintenance, told me that I was terminated for lack of knowledge and disciplinary procedures. My termination paper indicates that I was terminated due to a reduction in force due to my position being eliminated.
>
> I believe that I was discriminated against because of my sex, male. I believe that similarly situated female employees were treated better than me.

Although Palmer repeatedly notified management that he desired transfer back to the Transportation Department, he was never offered the opportunity. In July 1996, June 1997, and November 1997, instructor positions became available in RTA's Transportation Department. In each of these instances, the position was the same union position that Palmer had held for over five years prior to his transfer to the Maintenance Department. Although Palmer had repeatedly requested a transfer back to a union position in the Transportation Department, TMSEL did not offer Palmer either of these three position, in complete disregard of Palmer's seniority rights.

On February 25, 1998, Palmer filed an action against TMSEL in the United States District Court for the Eastern District of Louisiana, Civil Action No. 98-0594.

On July 12, 1999, TMSEL filed a motion for summary judgment on the following grounds: (1) the acts of gender bias alleged by Palmer do not rise to the level of "ultimate employment decisions" that are actionable under Title VII; (2) Palmer's retaliation claim should be dismissed because he failed to exhaust administrative remedies; (3) that Palmer cannot show that TMSEL's conduct constituted intentional infliction of emotional distress, and that even if Palmer's allegations are accepted as true, TMSEL's conduct was not so outrageous as to constitute intentional infliction of emotional distress under Louisiana law; (4) that Palmer's breach of employment contract and wrongful discharge claims have no foundation in Louisiana law

because he was an at-will employee; and (5) that Palmer's ERISA claim fails because Palmer cannot show that TMSEL had the specific intent to deprive Palmer of his ERISA benefits.

On January 18, 2000, the United States District Court granted TMSEL's Motion for Summary Judgment, dismissing all of Palmer's claims. (App. 7a and 8a). Palmer timely appealed to the United States Court of Appeals for the Fifth Circuit. On August 21, 2000, the Fifth Circuit summarily affirmed the decision of the District Court. (App. 1a and 3a).

REASONS FOR GRANTING THE WRIT

I. IT WAS ERROR FOR THE DISTRICT COURT TO DISMISS PALMER'S CLAIM FOR BREACH OF CONTRACT WHERE TMSEL FAILED TO COUNTER PALMER'S ALLEGATIONS THAT DESPITE HIS SENIORITY, HE WAS DENIED OPPORTUNITIES TO TRANSFER BACK TO A UNION POSITION AND THAT EMPLOYEES WITH LESS SENIORITY WERE TRANSFERRED TO APPLICABLE UNION POSITIONS

TMSEL does not dispute that Palmer, an employee of nineteen years, enjoyed seniority rights, including protection from layoff and preference in promotions and rehiring. TMSEL could not dispute Palmer's seniority rights because these rights were protected by Louisiana Revised Statute 23:890 (App. 22a) and by Palmer's employment contracts. TMSEL's

sole argument in support of summary judgment dismissal of Palmer's breach of contract claim is that Palmer was an "at-will" employee. In dismissing Palmer's breach of contract claim, the District Court ignored Palmer's seniority rights, and also ignored *uncontested* facts showing that TMSEL violated Palmer's seniority rights. The undisputed facts show that TMSEL failed to consider Palmer for available union positions in the Transportation Department, in complete disregard of Palmer's seniority rights. The undisputed facts further show that if TMSEL had honored Palmer's seniority rights and transferred him back to a union position, Palmer would have been secure from the June 1997 layoff. Under the circumstances, a genuine issue of material fact remains as to whether TMSEL breached Palmer's employment contract.

Palmer's seniority rights were protected by Louisiana Revised Statute 23:890(C), which provides, in pertinent part:

> Whenever a municipality, transit authority, or other authority organized for the purpose shall acquire an existing public transportation system, all of the employees of such system to the extent necessary for the operation thereof, except executive or administrative officers and employees, shall be transferred to and appointed as employees of the said municipality, transit authority or other authority and these employees shall be given sick leave, *seniority*, vacation and

pension credits in accordance with the records of the acquired system.

(See App. 22a; emphasis added).

Pursuant to Louisiana Revised Statute 23:890, several agreements were entered into between TMSEL and Palmer's union. Article VI of the collective bargaining agreement between TMSEL and Palmer's union protected the seniority rights of union members, including after layoffs. Article VI provided, in pertinent part:

> 6.1(a) Seniority. Except as provided otherwise in this Agreement, Seniority shall mean an employee's length of continuous service in the job classification to which he/she is assigned, measured from the date and time the employee was hired into the job classification. . . .
>
> 6.2 Layoff
>
> (a) Determination of Layoffs. The Company will determine the timing of layoffs, the number of employees to be laid off, and in which seniority pool(s) layoffs will be effected. . . .
>
> (b) Order of Layoffs. If the Company determines to layoff employees, the Company will lay off in order

> of the most junior employees in the effected job classification first.
>
> 6.4 - Termination of Seniority. An Employee's seniority shall be lost for the following reasons:
>
> (a) discharge (unless reinstated through grievance procedure) quit, retirement, death or resignation; . . .
>
> (e) layoff for a period of twelve (12) months.

A February 1987 Case Report concerning the purpose of the collective bargaining agreement stated: "The original 13(c) letter [i.e. the collective bargaining agreement], signed by NOPSI (?) and the unions in 19??, was binding on RTA. So was Louisiana's 13(c) law. These protected all former NOPSI employees, including management, from layoff." (question marks original)

In addition to the collective bargaining agreement, other agreements protected Palmer's seniority and protected him from layoff. In an October 3, 1995 letter from TMSEL to Palmer's union concerning Palmer's transfer to the Maintenance Department, TMSEL stated: "Further, whenever positions become available in the area where they previously worked, they will be given priority to return to their prior position provided this is their desire. This memorandum of understanding is between the local union and the Authority. The contents are binding on the part of both parties." TMSEL's

Employee Handbook stated: "Employees dismissed because of a reduction in the work force shall be given first consideration in filling vacancies occurring after such reduction in the workforce." All of the foregoing agreements were attached to Palmer's opposition to TMSEL's motion for summary judgment. Palmer also made the uncontested assertion that he was told by representatives of his union and TMSEL that because he was a former employee of NOPSI, a private corporation, he would be protected from layoffs, and in fact could not be laid off.

Louisiana Revised Statute 23:890 and the foregoing agreements establish Palmer's seniority rights. Palmer made the uncontested assertion that his continued requests to be transferred back to the Transportation Department were denied, despite the fact that openings for Palmer's former position became available on at least three occasions. As discussed below, Palmer also raised a genuine issue of material fact as to whether his seniority rights were violated because of gender discrimination. In view of these genuine issues of material fact, it was error to dismiss Palmer's claim for breach of contract on summary judgment.

The District Court dismissed Palmer's breach of contract claim based largely on TMSEL's assertion that the position Palmer held at the time of his discharge was a non-union position. However, the District Court overlooks the fact that Palmer was in a non-union position only because TMSEL violated Palmer's seniority rights by refusing to transfer him back to available

union positions. The District Court also concluded that the agreements relied upon by Palmer did not establish employment contracts for a fixed term nor did they forever prevent reductions in force. The Court held that because Palmer was an at-will employee, he could be terminated for any reason or for no reason at all. It is respectfully suggested that the Court's conclusion is misplaced. The question is not whether Palmer was an at-will employee, but whether his seniority rights were violated. On this issue, a genuine issue of material fact remains.

The District Court further concluded that even if the agreements did provide for a fixed term and prevent reductions in force, Palmer failed to show that he exhausted the grievance procedures provided for in the agreements. This finding is particularly questionable. It is undisputed that Palmer filed a grievance with the Louisiana Commission on Human Rights concerning his 1997 layoff. On one hand, the Court places great emphasis on the fact that Palmer was no longer a union member, but on the other hand denies Palmer's contract claim because he allegedly did not follow the grievance procedures set forth in the collective bargaining agreement.

Unfortunately, in focusing on the uncontested fact that Palmer was in a non-union position, the Court overlooked a number of important factual and legal issues concerning Palmer's claim for breach of contract. It is undisputed that Palmer enjoyed seniority rights under Louisiana Revised Statute 23:890 and his employment agreements, and by virtue of his nineteen

years of service. The District Court ignored Palmer's uncontested allegations showing that he was in a non-union position only because he was denied an opportunity to transfer back to a union position, where he would have been secure from the June 1997 layoff. In denying Palmer an opportunity to return to a secure union position, TMSEL violated Palmer's seniority rights, and in so doing violated Louisiana Revised Statute 23:890 and breached Palmer's employment contracts. Under the circumstances, it was error to dismiss Palmer's breach of contract claim on summary judgment.

II. IT WAS ERROR FOR THE DISTRICT COURT TO GRANT TMSEL'S MOTION FOR SUMMARY JUDGMENT WHEN MATERIAL QUESTIONS OF FACT REMAINED AS TO WHETHER PALMER SUFFERED GENDER DISCRIMINATION AND ADVERSE EMPLOYMENT ACTIONS

a. Palmer's claim for gender discrimination

In granting summary judgment dismissing Palmer's claim of gender discrimination, the District Court ignored many critical *uncontested* issues of material fact that strongly support a finding that Palmer suffered an adverse employment consequence as a result of gender discrimination. Title VII was enacted to redress discrimination which results in a significant change in an employee's employment status, such as

hiring, firing, failing to promote, reassignment with significantly decreased responsibilities, or a decision causing a significant change in benefits. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 2268 (1998). In this case, Palmer's uncontested allegations raise at minimum a genuine issue of material fact as to whether Palmer suffered an adverse employment action because of gender discrimination.

TMSEL did not dispute the fact that Palmer was laid off (i.e. fired), denied promotions back to the union position that he had held for over five years, and suffered significant changes in benefits (after 19 years of employment, Palmer was only one year from fully vesting). As the District Court properly recognized, firings, denials of promotions, and significant changes in benefits all constitute significant changes in an employee's employment status. Palmer submitted uncontested allegations showing that these significant changes in his employment status resulted from gender discrimination.

TMSEL does not dispute that Palmer was contractually entitled to preferences based on seniority, including most importantly preference in promotions and rehiring. TMSEL acknowledges that Bowie and Newman, two females with less seniority than Palmer, were transferred back to the Transportation Department. TMSEL does not dispute Palmer's allegation that he overheard his supervisor promise Bowie that she would be transferred back to Transportation, a promise that was fulfilled shortly thereafter. TMSEL does not dispute the fact that Bowie and Newman received preference in

scheduling and vacations, despite the fact that Palmer had seniority. TMSEL does not dispute that at least three Instructor positions became available in Transportation between July 1996 and November 1997, none of which were offered to Palmer. TMSEL does not dispute that Palmer was qualified to fill the three available Instructor positions, a position Palmer had ably filled for over five years prior to his unilateral transfer to a non-union position in the Maintenance Department. Finally, and most importantly, TMSEL does not dispute the fact that: (1) if Palmer had been given an equal opportunity to transfer back to a union position in the Transportation Department, he would have been secure from the 1997 layoff; and (2) because Bowie and Newman were transferred back to the Transportation Department, they were not laid off. The foregoing uncontested facts are more than sufficient to raise a genuine issue of material fact as to whether Palmer suffered an adverse employment consequence because of gender discrimination.

Additionally, the transfer documents for Bowie indicate that she was transferred back to the Transportation Department with a $2 per hour raise. Palmer contends that the transfer document shows that Bowie received a raise, despite the fact that Palmer had seniority over Bowie. Although the transfer document shows on its face that Bowie received $16 per hour rather than the $14 per hour she had been receiving in the Maintenance Department, TMSEL alleged that the enhanced hourly rate was merely a typographical error and that payroll records show Bowie did not receive a

raise. In support of this position, TMSEL submitted additional payroll records and the affidavit of a TMSEL employee in charge of payroll. It is respectfully submitted that an affidavit of a TMSEL employee is not sufficient to demonstrate that the transfer document contains a typographical error. If TMSEL wishes to contend that the transfer document contains a typographical error, TMSEL should be required to prove this fact at trial by competent evidence. In any event, the fact remains that Bowie and Newman were transferred back to secure positions in the Transportation Department while Palmer, who had seniority over Bowie and Newman, was denied an equal opportunity to return to a secure union position.

In spite of the foregoing uncontested issues of fact supporting Palmer's claim for gender discrimination, the Court concluded that Palmer produced no credible evidence that he suffered a loss in pay, a demotion, or a significantly detrimental change in job responsibilities. In reaching this conclusion, the District Court relied almost exclusively on TMSEL's legal argument that subjecting Palmer to unwelcome shift changes, denying lateral transfers to Palmer, and granting lateral transfers to Bowie and Newman were not the sort of adverse employment actions that Title VII was created to redress. The District Court ignored Palmer's showing that he was denied a transfer back to a secure union position because of gender bias.

The Court also placed great weight on TMSEL's argument that 20 of the 28 employees who were laid off simultaneously with Palmer were female, none of whom

were ever rehired. It is respectfully suggested that the gender composition of the individuals who were laid off simultaneously with Palmer has no bearing whatsoever on whether Palmer's supervisors engaged in gender discrimination when they transferred Bowie and Newman back into secure union positions in preference to Palmer, an employee with seniority over Bowie and Newman. There is no showing that the individuals who made the decision to layoff the 28 employees were the same supervisors who transferred Bowie and Newman back to their former union positions while denying Palmer an equal opportunity to do the same. Additionally, even if the same individuals were involved in making these two entirely separate decisions, this would not change the fact that Palmer was denied an equal opportunity to transfer back to his former position in the Transportation Department.

Palmer's uncontested facts are sufficient to raise a genuine issue of material fact as to whether Palmer suffered an adverse employment consequence because of gender discrimination. The uncontested facts show that Palmer's supervisors ignored his nineteen years of service, his senior status, and his repeated requests for transfer back to the Transportation Department. In contrast, the uncontested facts show that two female employees with less seniority than Palmer were transferred back into secure positions in the Transportation Department, and as a result were not laid off by TMSEL. Had Palmer received treatment equal to Bowie and Newman, he would now be finishing his twenty-second year of employment with TMSEL rather

than pleading for relief from the Courts. In dismissing Palmer's claim on summary judgment, the District Court overlooked the foregoing uncontested material facts, and in so doing lost sight of the very real adverse employment consequence suffered by Palmer as a result of gender discrimination.

b. Palmer's claim for retaliatory firing

Palmer asserted a claim for retaliatory firing resulting from his October 13, 1995 internal grievance regarding selection of work schedules and vacation time without regard to seniority preferences. The District Court concluded that it lacked jurisdiction over Palmer's retaliation claim because Palmer failed to exhaust administrative remedies. In reaching this conclusion, the District Court held that Palmer's June 9, 1997 EEOC grievance listed gender as the only basis of discrimination and made no mention of events occurring prior to 1997. In concluding that Palmer failed to exhaust administrative remedies, the District Court erred by failing to consider whether a claim for retaliatory firing could reasonably have been expected to grow out of the charges set forth in Palmer's 1997 EEOC grievance.

A court has ancillary jurisdiction to hear a claim of retaliation even if it was not filed with the EEOC when the claim grows out of an administrative charge that is properly before the court. *Barrow v. New Orleans Steamship Association, 932 F.2d 473 (5th Cir. 1991).* Palmer's 1997 EEOC grievance, though directed to his

firing on the basis of gender discrimination, also states: "Jerome Beasley, Superintendent of Maintenance, told me that I was terminated for lack of knowledge and disciplinary procedures." Since Palmer was never subjected to disciplinary procedures, Beasley's statement could refer only to Palmer's 1995 EEOC grievance. TMSEL does not dispute Palmer's allegation that during an October 13, 1995 meeting concerning Palmer's grievance, Bailey told Palmer that he did not like employees filing grievances and that he did not care about seniority "because we place employees where we want to put them." In view of Palmer's complaint concerning Beasley's statement that Palmer was terminated for lack of knowledge and disciplinary procedures, a charge of retaliatory firing from Palmer's 1995 EEOC complaint could reasonably be expected to grow out of an investigation into Palmer's 1997 EEOC complaint. Under the circumstances, the wording of Palmer's 1997 EEOC complaint should not deprive Palmer of the opportunity to assert a factually supportable claim for retaliatory firing.

The Court further held that even if Palmer exhausted his administrative remedies, the Court would still reject his retaliation claim because Palmer did not prove that he engaged in an activity protected by Title VII. The District Court held that Title VII does not reach seniority claims based merely on an employees years of service within a company, and further held that Palmer did not prove that he suffered an adverse employment action, since unwanted shift changes, criticisms, lateral transfers and the like do not constitute adverse

employment actions redressable under Title VII. For the reasons set forth above, Palmer believes the Court erred in these findings. The uncontested facts are sufficient to raise a genuine issue as to whether Palmer suffered an adverse employment consequence as a result of gender discrimination.

c. Palmer's Louisiana state law claim for intentional infliction of emotional distress

Palmer asserted a Louisiana state law claim for intentional infliction of severe emotional distress. Palmer argued that TMSEL's conduct in failing to transfer him back to the Transportation Department while promoting a less senior and less qualified female ahead of him ultimately resulted in Palmer losing his job, his benefits, and his ability to support his family. In rejecting Palmer's claim for intentional infliction of emotional distress, the District Court correctly held that ordinary employment disputes will rarely rise to the level of intentional infliction of emotional distress. However, if Palmer proves gender discrimination, he may well establish the basis of a claim of intentional infliction of emotional distress under state law. See e.g. *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977). In view of the uncontested facts concerning gender discrimination, it was error to grant summary judgment dismissing Palmer's claim for intentional infliction of emotional distress.

III. IT WAS ERROR TO DISMISS PALMER'S ERISA CLAIM ON SUMMARY JUDGMENT WHERE A GENUINE ISSUE OF MATERIAL FACT REMAINS AS TO WHETHER TMSEL INTENDED TO INTERFERE WITH PALMER'S ERISA BENEFITS

The District Court dismissed Palmer's ERISA claim on grounds that Palmer came forward with no credible summary judgment evidence which creates a genuine factual dispute as to whether TMSEL had the specific intent to violate Palmer's ERISA rights. In reaching this conclusion, the District Court ignored undisputed factual assertions that raise a genuine issue as to whether TMSEL intended to deprive Palmer of ERISA benefits. In view of the undisputed facts, it was error to resolve the issue of TMSEL's intent on summary judgment.

In ERISA, Congress wanted to ensure that the benefits promised by employers are kept. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981). Thus, Congress devised a comprehensive and reticulated regulatory scheme which, among other things, protects employees against purposeful interference by their employer with attainment of their rights under an employee benefit plan. *Id.*

Section 510 of ERISA bars employers from terminating or discriminating against employees for the purpose of interfering with their attainment of rights under a plan. See 29 U.S.C. § 1140. Section 510 prevents employers from circumventing, and thus gives

meaning to, the vesting and other minimum standards established by ERISA and contained in pension plans. "To recover under section 510, a plaintiff need not show that 'the sole reason for his [or her] termination was to interfere with pension rights'; however, the plaintiff must show that the employer had the 'specific intent to violate ERISA'". *Clark v. Resistoflex Company, A division of Unidynamics Corporation*, 854 F.2d 762, 770 (5th Cir. 1988) (quoting *Gavalik v. Continental Can Company*, 812 F.2d 834, 851 (3rd Cir.), *cert. denied*, 484 U.S. 979, 108 S.Ct. 495 (1987)). Proof of a mere incidental loss of benefits as a result of being terminated will not constitute a violation of §1140. *Dewitt v. Penn-Del Directory Corporation*, 106 F.3d 514, 522-23 (3rd Cir. 1997). "Consequently, to recover under section 510, the employee must show that the employer made a conscious decision to interfere with the employee's attainment of pension eligibility or additional benefits." Id. at 523. A prima facie case under Section 510 of ERISA requires additional evidence suggesting that pension interference was a motivating factor. Id.

The District Court dismissed Palmer's ERISA claim on grounds that Palmer suffered only the sort of incidental loss of benefits that occurs every time an ERISA employer discharges an employee. The Court concluded that the mere fact that Palmer was laid off only eighteen months prior to vesting was not sufficient to raise a question of intent. However, in reaching this conclusion, the District Court ignored a number of undisputed issues of fact that raise a genuine issue as

to whether TMSEL intended to deprive Palmer of ERISA benefits.

It is undisputed that Palmer had worked for TMSEL for almost nineteen years at the time of his layoff, and was only eighteen months away from vesting in TMSEL's ERISA plan. Until he filed his 1995 EEOC grievance to preserve his seniority rights, Palmer had never received a poor performance evaluation. As outlined above, the undisputed facts show that Palmer had statutorily and contractually protected seniority rights. The undisputed facts show that TMSEL failed to consider Palmer for available union positions in the Transportation Department, in complete disregard of Palmer's seniority rights. The undisputed facts further show that two female employees with less seniority than Palmer were transferred back to the Transportation Department, and as a result were not laid off by TMSEL. Finally, the undisputed facts show that if TMSEL had honored Palmer's seniority rights and offered him an equal opportunity to transfer back to a union position, Palmer would have been secure from the June 1997 layoff. When all of the foregoing undisputed facts are considered in view of the undisputed fact that Palmer was only eighteen months from fully vesting at the time of his layoff, it is respectfully suggested that a genuine issue of material fact remains as to whether TMSEL intended to deny Palmer ERISA benefits.

Under the District Court's standard, it would be virtually impossible to survive summary judgment on the issue of whether an employer intended to deprive an employee of ERISA benefits. Even in the face of

undisputed facts showing deprivation of seniority rights and resulting denial of an impending vestiture under an ERISA plan, an employee such as Palmer would have to produce direct proof of intent, such as a smoking gun document or testimony of a rogue employee. The existence of such direct evidence of intent is merely a matter of chance, and in most cases the issue of intent must be resolved from circumstantial evidence.

Under the undisputed facts of this case, the District Court should have allowed the issue of intent to go to the jury. When intent or state of mind is an essential element of the nonmoving party's claim, it is less fashionable to grant summary judgment because a person's state of mind is inherently a question of fact which turns on credibility. *International Shortstop, Inc., and Sam Talkington v. Rally's , Inc.*, 939 F.2d 1257 (5th Cir. 1991). Only through live cross-examination can the fact-finder observe the demeanor of a witness, and assess his credibility. A cold transcript of a deposition is generally no substitute because it cannot unmask the veracity of a testifying witness clad in a costume of deception; it cannot unveil that a seemingly well-groomed witness is coming apart at the seams: "that he fidgets when answering critical questions, his eyes shift from the floor to the ceiling, and he manifests all other indicia traditionally attributed to perjurers." *Id.* at 1255 and 1256. "When an issue requires determination of state of mind, it is unusual that disposition may be made by summary judgment. *Alabama Great So. R.R. (Co.) v. Louisville & N.R.R. (Co.,)* 224F.2d 1, 5, 50 A.L.R. 2d 1302 (5th Cir. 1955). It is important, and ordinarily

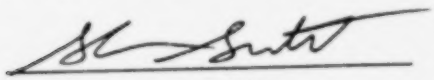
essential, that the trier of fact be afforded the opportunity to observe the demeanor, during direct and cross-examination, of a witness whose subjective motive is at issue." *Consolidated Electric Co. v. United States for Use and Benefit of Gough Industries*, 9 Cir. 1966, 355 F.2d 437, 438, 439. See also *Poller v. Columbia Broadcasting Company*, 1962, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed. 2d 458; 6 Moore's Federal Practice, 2d ed., para. 56.17 (41.-1); 3 Barron & Holtzoff, Federal Practice & Procedure, 1967 PP., § 1232.2. It has long been established that it is inappropriate to resolve issues of credibility, motive, and intent on motions for summary judgment and as such summary judgment simply may not be granted when such matters as defendant's motive and intent are questioned. *Hardin v. Pitney-Bowes, Inc.*, 451 U.S. 1008 (1981).

In view of the undisputed facts, the District Court erred in granting summary judgment on the issue of whether TMSEL intended to deprive Palmer of ERISA benefits. The case should be remanded to allow a jury to determine intent based on the totality of the evidence.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Fifth Circuit and, ultimately, to vacate and reverse the judgment below and remand for further proceedings to address and resolve whether the District Court erred in dismissing all of Palmer's claims on summary judgment.

Respectfully Submitted:



Shawn D. Sentilles
Counsel of Record
LOBRANO & LOBRANO, L.L.C.
8558 Highway 23, Suite Two
Post Office Box 208
Belle Chasse, Louisiana 70037
Phone: (504) 433-3100

Attorneys for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 00-30184
Summary Calendar

D.C. Docket No. 98-CV-594-K

SYLVESTER PALMER

Plaintiff - Appellant

v.

TRANSIT MANAGEMENT SOUTHEAST LOUISIANA (TMSEL)
REGIONAL TRANSIT AUTHORITY; REGIONAL TRANSIT
AUTHORITY; AMALGAMATED TRANSIT UNION, Division
1611; UNIDENTIFIED PARTY

Defendants - Appellees

September 13, 2000 - Filed

Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans

Before SMITH, BARKSDALE, and PARKER, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

It is FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: September 12, 2000

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 00-30184
SUMMARY CALENDAR

SYLVESTER PALMER,

Plaintiff-Appellant,

VERSUS

TRANSIT MANAGEMENT SOUTHEAST LOUISIANA (TMSEL)
REGIONAL TRANSIT AUTHORITY, REGIONAL TRANSIT AUTHORITY,
AMALGAMATED TRANSIT UNION, Division 1611, UNIDENTIFIED PARTY

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(98-CV-594-K)

August 21, 2000, Filed.

Before SMITH, BARKSDALE, and PARKER, Circuit Judges.

PER CURIAM:*

Sylvester Palmer, terminated as part of a reduction in force, appeals the summary judgment dismissing his claims under Title VII (gender discrimination), ERISA, and state law (breach of contract). He contends that summary judgment should not have been granted, because: discovery was not complete; there was a material fact issue on whether he had suffered an adverse employment action; he was protected from layoffs under a collective bargaining agreement; and he demonstrated that pension interference motivated his termination.

NOPSI hired Palmer in July 1978 as a bus driver. He was a member of Amalgamated Transportation Union Local 1611. In 1983, NOPSI was acquired by the Transit Management Southeast Louisiana Regional Transit Authority (TSMEL). The union negotiated agreements between its members and TSMEL concerning this transaction.

In October 1995, Palmer was transferred, along with several male and female co-workers, from the transportation department to non-union positions in the maintenance department.

That December, a female co-worker was transferred back to the transportation department at no change in salary. A year later, another female co-worker was transferred from the maintenance department to the transportation department. As part of a reduction in force in March 1997, Palmer was terminated from his non-union position in the maintenance department.

The parties consented to trial before a magistrate judge. Defendants were awarded summary judgment,

the magistrate judge holding, in pertinent part, that: (1) Palmer had not suffered an adverse employment action in being denied lateral transfers and receiving shift changes and less training; (2) the reduction in force that resulted in his termination, which included 20 females and eight other males, did not support his gender discrimination claim; (3) Palmer's position in the maintenance department was not covered by the collective bargaining agreement, therefore, he was an at-will employee subject to being terminated at any time; and, (4) for his pension rights claim, he had failed to provide any evidence that his employer intended to violate ERISA.

We review a summary judgment de novo; it is proper if, viewing the summary judgment record in the light most favorable to the non-movant, there is no material fact issue and the movant is entitled to judgment as a matter of law. *E.g.*, ***Drake v. Advance Const. Serv., Inc.*** 117 F.3d 203, 204 (5th Cir. 1997); Fed. R. Civ. P. 56.

Palmer contends the magistrate judge erred by ruling on summary judgment before completion of discovery. Two of the three sets of interrogatories he propounded in August 1999 were quashed prior to the summary judgment ruling. The remaining set was propounded to the EEOC.

Rule 56 (f) permits a nonmovant to obtain a continuance in order to gather additional evidence to respond to a summary judgment motion. But, the nonmovant must demonstrate how the additional discovery will defeat the summary judgment motion. Vague assertions are not sufficient. See ***International***

Shortstop, Inc. v. Rally's, Inc., 939 F. 2d 1257 (5th Cir. 1991), *cert. denied*, 502 U.S. 1059 (1992). Palmer, in a cursory manner, merely asserts that the proposed discovery will create a material fact issue.

In additions, Palmer was dilatory in seeking discovery. This action was filed in February 1998. Trial was scheduled initially for 21 June 1999. Defendants moved for summary judgment on 12 July 1999. The magistrate judge scheduled a hearing on the motion for that August, but did not rule on the motion until 18 January 2000. Yet, the discovery that Palmer contends the court should have waited on was not requested until 9 August 1999, after the originally scheduled trial date. If a party has not diligently pursued discovery, the court does not have to grant additional time to gather it prior to ruling on summary judgment. ***Id.***

Accordingly, because Palmer neither diligently pursued discovery, nor stated with specificity how it would create a material fact issue, the magistrate judge did not err in not allowing a continuance of the summary judgment motion.

On the remaining issues, and based upon our de novo review of the record and review of the briefs, summary judgment was proper essentially for the reasons stated by the district court. ***Palmer v. Transit Management Southeast La. Reg'l Transit Auth.***, No. 98-CV-594-K (E.D. La. 18 Jan. 2000).

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SYLVESTER PALMER **CIVIL ACTION**
NUMBER: 98-0594
VERSUS **SECTION: "K" (5)**

TRANSIT MANAGEMENT SOUTHEAST LOUISIANA (TMSEL) REGIONAL TRANSIT AUTHORITY, ET AL

January 18, 2000 - Filed

JUDGMENT

The Court, having considered the motion, the record, the applicable law, and for the written reasons assigned;

IT IS ORDERED, ADJUDGED, AND DECREED defendants' motion for summary judgment is **GRANTED** and that plaintiff's suit is **DISMISSED WITH PREJUDICE**.

New Orleans, Louisiana, this 14th day of January, 2000.

S/Alma L. Chasez
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SYLVESTER PALMER	**CIVIL ACTION**
VERSUS	**NUMBER: 98-0594**
TRANSIT MANAGEMENT SOUTHEAST LOUISIANA (TMSEL) REGIONAL TRANSIT AUTHORITY, ET AL.	**SECTION: "K" (5)**

January 18, 2000, Filed.

ORDER AND REASONS

Presently before the Court is defendants' motion for summary judgment and plaintiff's opposition thereto. (Rec. docs. 49, 63,77, 79). For the reasons that follow, it is ordered that defendant's motion is granted and that plaintiff's suit is dismissed.

The facts pertinent to a resolution of the matter at hand are as follows. In July of 1978, plaintiff was hired by New Orleans Public Service, Inc. ("NOPSI") in the capacity of operator (bus driver), a union position. Five years later, NOPSI was acquired by the Regional Transit Authority/Transit Management Southeast Louisiana ("TMSEL"). By 1995, plaintiff had worked himself up to the position of instructor within the Transportation Department, another union position. On October 6, 1995, plaintiff was transferred from the instructor position to the position of assignment supervisor in the Maintenance Department, a non-union position. Along with plaintiff, three male instructors and one female run

dispatcher, Dale Newman, were also reassigned to the Maintenance Department.[1]

On October 13, 1995, plaintiff filed an internal grievance wherein he complained that his lateral transfer had operated to deprive him the benefit of seniority in the selection of work schedules and vacation time.[2] At a meeting held on plaintiff's grievance, he was allegedly promised a restoration of seniority benefits.

Thereafter, plaintiff alleges that he received constant shift changes, cancellation of vacation days, and sub-standard evaluations.[3] In December of 1995, Newman was transferred back to the Transportation Department to the position of run dispatcher, a job she had

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[1]When plaintiff was laterally transferred to the Maintenance Department, another employee over whom he allegedly had seniority, James St. Charles, was allowed to remain in the Transportation Department. Plaintiff alleges that this violated the seniority provisions of the contract entered into between his union and TMSEL.

[2]The substance of plaintiff's grievance, as reflected on the form that he completed for that purpose, was that shift schedules and vacation time were determined alphabetically subsequent to his transfer to the Maintenance Department, contrary to being determined on the basis of seniority. Although not specifically mentioned in the written grievance form, plaintiff also alleges that his "seniority" rights were violated because Newman received better shift assignments and vacation schedules following their reassignment to the Maintenance Department.

[3]Plaintiff makes no allegation that these occurrences resulted in a change of his job duties or loss of pay.

previously held, at no change in salary. The following month, Francis Bowers, a female, was transferred to the Maintenance Department as assignment supervisor. Plaintiff alleges that Bowers, too, received preferential treatment in the selection of work schedules, training, and vacation time. On December 30, 1996, Bowers was transferred to the para-transit Department as a senior run dispatcher with no change in salary.[4] Subsequently, on March 31, 1997, plaintiff, along with twenty other female employees and eight other male employees, was terminated as a result of a reduction in force ("RIF"). At the time of the RIF, plaintiff was allegedly told that he was being terminated due to a "lack of knowledge and disciplinary procedures." On June 9, 1997, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). The standardized charge form signed by plaintiff indicates that the alleged discrimination was based on gender alone and that the acts involved occurred between January 1, 1997 and March 31, 1997. The particulars of the charge are as follows:

> [i]n 1/97 my work shift was changed. In 1/97 I was denied transfer back to the Transportation Department. On 3/31/97 I was discharged from my position as an assignment supervisor earning $14.15 per hour. There are about 1,200 employees at the company.
>
> No reason was given for the shift change or transfer. Jerome Beasley, Superintendent of Maintenance, told me that I was terminated for

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[4]The affidavit of TMSEL'S acting Director of Human Resources establishes that Bowers' salary was not increased in connection with this lateral transfer and that the sole reference to any purported increase was a mere typographical error. (Rec. doc. 77, ex. 7)

lack of knowledge and disciplinary procedures. My termination paper indicates that I was terminated due to a reduction in force due to my position being eliminated.

I believe that I was discriminated against because of my sex, male. I believe that similarly situated female employees were treated better than me.

(Rec. doc. 49, ex. 9)[5]

Around this time, plaintiff alleges that an instructor position within the Transportation Department became available upon the retirement of Raymond Ambrose.

Defendants now move for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. Rule 56(c) provides that "...judgment...shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In Celotex v. Catrett, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555 (1986), the Supreme Court interpreted Rule 56(c) to mandate the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. At 322, 106 S.Ct. at 2552.

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[5]Notwithstanding the allegations contained within the charge of discrimination, plaintiff testified at his recent deposition that gender discrimination played no part in the RIF. (Rec. doc. 49, ex. 1, pp. 85-86)

The party moving for summary judgment must"...demonstrate the absence of a genuine issue of material fact..." but need not "...support its motion with affidavits or other similar materials negating the opponent's claim." Celotex, 477 U.S. at 323, 106 S.Ct. at 2553. The moving party may discharge its burden "...by 'showing' - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case." Id. at 325, 106 S.Ct. at 2554. If the moving party fails to carry that initial burden, the motion must be denied. However, if the moving party discharges its burden, the nonmovant must go beyond the pleadings and designated specific facts showing that there is a genuine issue for trial. Id. at 324, 106 S.Ct. at 2553. "'[C]onclusory allegations, speculation, and unsubstantiated assertions'" will not suffice to satisfy the nonmovant's burden. Grimes v. Texas Department of Mental Health and Mental Retardation, 102 F.3d 137, 139-40 (5th Cir. 1996) (quoting Douglass v. United Services Automobile Association, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc)). Rather, the nonmovant must come forward with "significant probative" evidence that there exists a triable factual issue. Kansa Reinsurance Company, Ltd. v. Congressional Mortgage Corporation of Texas, 20 F.3d 1362, 1371 (5th Cir. 1994). And, in employment discrimination cases, summary judgment is not precluded merely because a plaintiff alleges that the defendants were motivated by discriminatory intent. Ward v. Bechtel Corporation, 102 F.3d 199, 202 (5th Cir. 1997)

Defendants first move for summary judgment on plaintiff's claim of gender discrimination, arguing that he suffered no "adverse employment action" as a result of unwelcome shift assignments; non-receipt of training; the lateral transfer of other employees with no increase in their salaries, no decrease in plaintiff's salary, and no diminishment of plaintiff's responsibilities; poor

performance appraisals, evaluations, or unjust reprimands; or, generally rude or inappropriate conduct.

Title VII was enacted to redress discrimination which results in a significant change in an employee's employment status, "...such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change of benefits." See Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761, 118 S.Ct. 2257, 2268 (1998). "Simply changing one's work schedule is not a change in ... [his] employment status." Watts v. Kroger Company, 170 F.3d 505, 510 (5th Cir. 1999). Being assigned extra work is also not a change in employment status. Id. (citing Reinhold v. Commonwealth of Virginia, 151 F. 3d 172, 175 (4th Cir. 1998)). Nor is a mere denial of training, Dollis v. Rubin, 77 F.3d 777, 779-82 (5th Cir., 1995), or a purely lateral transfer. Burger v. Central Apartment Management, Inc., 168 F.3d 875, 879-80 (5th Cir. 1999).

In light of these authorities, plaintiff's gender discrimination must fall. The fact that he was subjected to an unwelcome shift change or was denied a lateral transfer are not adverse employment actions that Title VII was created to redress.[6] Bowers' receipt of additional training and she and Newman's lateral transfers with no changes in their salaries fall into the same category. (See note 4, supra). Quite simply, the Court has before it no credible summary judgment evidence indicating that plaintiff suffered a loss in pay, a demotion, or a significantly detrimental change in job responsibilities. As regards the March 31, 1997 RIF, some twenty other female employees and eight other male employees were terminated at the same time. These numbers indicate

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[6]As noted supra, it is these actions which plaintiff complained of in his sole charge of discrimination to the EEOC.

that females were not favored in the RIF; quite to the contrary, insofar as two and one-half times more females than males were laid off, males were actually treated more preferentially. At his deposition, plaintiff testified that to the best of his knowledge, not one of the females subject to the RIF was subsequently reemployed by the defendants. (Rec. doc. 49, ex. 1, pp. 7-9). The circumstances surrounding the RIF do not support plaintiff's claim of gender discrimination.[7]

Defendants next move for summary judgment on plaintiff's claim of retaliation for filing his October 13, 1995 internal grievance regarding the non-seniority-based selection of work schedules and vacation time. The thrust of plaintiff's grievance was that employees' schedules, determined on the basis of seniority prior to plaintiff's transfer to the Maintenance Department, were now determined alphabetically. (Rec. doc. 49, ex. 3)

A fair reading of plaintiff's October 13, 1995 grievance does not reflect that it was gender-based. Rather, he complained that the benefit of seniority, irrespective of gender, was lost upon his lateral transfer to the Maintenance Department. After that grievance was addressed internally, plaintiff filed no charge of discrimination with the EEOC concerning the 1995 events set forth in the grievance. The sole charge that plaintiff did file with the EEOC on June 9, 1997 listed gender as the only basis of discrimination and made no mention whatsoever of any events occurring prior to 1997. 9 Rec. doc. 49, ex. 9).

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[7]Although plaintiff summarily opposed paragraphs 21 and 24 of defendants' statement of uncontested material facts wherein it set forth the numbers of males and females involved in the RIF, he has come forward with no evidence suggesting that those numbers were incorrect or that females were favored over males in the layoff.

It is axiomatic that a plaintiff must exhaust available administrative remedies prior to filing suit under Title VII. Dollis, 77 F.3d at 781 (citing Ray v. Freeman, 626 F.2d 439, 442 (5th Cir. 1980), cert. denied, 450 U.S. 997, 101 S.Ct. 1701 (1981)). A court entertaining a Title VII suit may consider only those specific claims set forth in a charge of discrimination and any kind of discrimination like or related to the charge's allegations, limited only by the scope of the EEOC investigation that could reasonably be expected to grow out of the charge. Id.; Fine v. GAF Chemical Corporation, 995 F.2d 576, 578 (5th Cir. 1993).

Plaintiff's sole charge to the EEOC drew its attention only to events that occurred in 1997. The alleged discrimination was based on gender alone. No mention is made of any alleged acts of discrimination that occurred prior to 1997. The Court has before it no evidence that the EEOC's investigation extended to incidents that occurred as far back as 1995. That being the case, the Court is constrained to conclude that it lacks jurisdiction over plaintiff's retaliation claim based on his failure to exhaust administrative remedies.

Alternatively, even if plaintiff had properly exhausted his retaliation claim through the EEOC process, the Court would reject it on the merits. The first element of a prima facie claim of retaliation requires a plaintiff to prove that he engaged in an activity protected by Title VII. Douglas v. DYN McDermott Petroleum Operations Company, 144 F.3d 364, 372 (5th Cir. 1998), cert. denied, _____ U.S. _____, 119 S.Ct. 798 (1999). An employee has engaged in activity protected by Title VII if he has either (1) "opposed any practice made an unlawful employment practice" by Title VII or (2) "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing" under Title VII. 42 U.S.C. §2000e-3(a); Grimes, 102 F.3d at 140; Long v. Eastfield College, 88 F.3d 300, 304 (5th

Cir. 1996). Title VII prohibits discrimination on the basis of race, color, religion, sex or national origin. 42 U.S.C. §2000e-2. It does not reach seniority claims based merely on an employee's years of service within a company, the basis of plaintiff's October 13, 1995 internal grievance. Without a showing that plaintiff engaged in activity protected by Title VII, his retaliation claim falls.

The second element of a prima facie case of unlawful retaliation requires a plaintiff to prove that he suffered an "adverse employment action." Douglass, 144 F.3d at 372; Grimes, 102 F.3d at 140; Long, 88 F.3d at 304. Here, again, plaintiff's proof falls short of the mark. As noted earlier, unwanted shift changes, criticisms, lateral transfers, and the like do not constitute adverse employment actions redressable under Title VII. Watts, 170 F.3d at 510; Burger, 168 F.3d at 879-80; Dollis, 77 F.3d at 879-80. The Court has also previously determined that the facts surrounding the RIF do not demonstrate unlawful discrimination. Summary judgment is thus appropriate on plaintiff's retaliation claim as well.

Next, defendants seek summary judgment on plaintiff's purported claim under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §2671, et seq. Notwithstanding the fact that the named defendants are not federal agencies, plaintiff makes no showing of having exhausted his FTCA remedies as required by 28 U.S.C. §2675. Summary judgment on this claim is appropriate as well.

As for plaintiff's state law claim for intentional infliction of emotional distress, defendants assert that the facts of this case only point to the typical, everyday employment disputes that occur in the more routine course of daily life. In opposition, plaintiff argues that his claim for intentional infliction of emotional distress is "serious and justified", that the defendants' conduct

in failing to transfer him back to the Transportation Department while "...promoting [a] less senior [ ] and less qualified female ahead of him ultimately resulted in plaintiff losing his job, his benefits and his ability to support his family." (Rec. doc. 63, p. 16).

As noted above, the lateral transfers of Newman and Bowers were unaccompanied by any increases in their salaries or a diminution of plaintiff's salary. Characterizing these lateral transfers as "promotions" is thus inappropriate.[8]

"To prevail on a claim for intentional infliction of emotional distress, the 'conduct complained of must be so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.'" Booth v. Intertrans Corporation, 1995 WL 324631 at *17 (E.D. La. 1995)) (quoting Deus v. Allstate Insurance Company, 15 F.3d 506, 514 (5th Cir. 1994) and White v. Monsanto, 585 So.2d 1205, 1209 (La. 1991)). "Conduct in the workplace, even if calculated to cause some degree of mental anguish, will rarely be so severe that it will rise to the level of 'outrageous conduct.'" Id. (citing Prunity v. Arkansas Freightways, Inc., 16 F.3d 649, 654 (5th Cir. 1994). "As such, ordinary employment disputes, even those involving discrimination and sexual harassment, will rise to the level of intentional infliction of emotional distress only in the most unusual of cases." Id. (citing Wilson v. Monarch Paper Company, 939, F.2d 1138, 1144 (5th Cir. 1991); Dean v. Ford Motor Company, 885, F.2d 300, 304-07 (5th Cir. 1989)). "Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. Persons must necessarily be expected to be hardened to a certain

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[8]Plaintiff admitted as much in his deposition. (Rec. doc. 49, ex. 1, pp. 16-17).

amount of rough language, and to occasional acts that are definitely inconsiderate and unkind." White v. Monsanto Company, 585 So.2d 1205, 1209 (La. 1991). Plaintiff has come forward with no credible summary judgment evidence that the conduct of which he complains was "outrageous in character...[and] atrocious and utterly intolerable in a civilized community." Booth, 1995 WL 324631 at *17. Accordingly, summary judgment on this claim will be granted as well.

Defendants also move for relief under Rule 56(c) on plaintiff's claim of the breach of an employment contract, arguing that none of the documents covering plaintiff's employment with them, such as their personnel handbook, create a contract for a fixed term, resulting in plaintiff being an at-will employee terminable for any reason or no reason at all. In opposition, plaintiff argues the written agreements entered into between NOPSI and plaintiff's union at the time of the former's take over by the defendants (the so-called "13(c) Agreement") constitute a valid, fixed-term employment contract which is binding on the defendants and forever protects all former NOPSI employees from layoffs. By way of their two reply memoranda, defendants counter that the existence of a fixed-term employment contract based on the 13(c) Agreement was neither pled in plaintiff's original or amended complaints nor mentioned in his deposition; that plaintiff was not a covered employee at the time of his discharge because he occupied the position of assignment supervisor, a non-union position; that the terms of the agreement itself do not prevent layoffs; and, at any rate, that plaintiff failed to exhaust the administrative remedies provided for in the 13(c) Agreement. (Rec. docs. 77, 79).

Plaintiff's purported contract claim is easily disposed of. In paragraph one of their statement of uncontested material facts, defendants assert that plaintiff's position

as assignment supervisor, the job he held at the time of the RIF, was a non-union position. Plaintiff has not contested that fact in his Local Rule 56.2 statement. Defendants have also come forward with the affidavit of the union president at he time of the RIF which further establishes that the position plaintiff held was not a covered one. (Rec. doc. 79, ex. 1). Furthermore, the agreements relied upon by plaintiff do not establish employment contracts for a fixed term nor do they forever prevent RIFs. Even if they did, plaintiff makes no showing of having exhausted the grievance procedures provided for in the agreements. As an at-will employee, plaintiff could be terminated for any reason or no reason at all. Walther v. National Tea Company, 848 F.2d 518, 519 n.1 (5th Cir. 1988). Plaintiff himself testified that the RIF was not gender-based and the facts indicate that males actually received preferential treatment in the layoff. The Court has also previously determined that plaintiff has no valid claim for retaliation in connection with the RIF. Rule 56(c) relief of this claim is thus warranted as well.

Next, defendants move for summary judgment on plaintiff's claim of a violation of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1140. In opposition thereto, plaintiff argues that the breach of his alleged employment contract with the defendants, in and of itself, constitutes an intentional violation of his ERISA rights. Plaintiff further argues that he was only eighteen months prior to being full vested when the RIF occurred.

"To recover under section 510, a plaintiff need not show that 'the sole reason for his [or her] termination was to interfere with pension rights'; however, the plaintiff must show that the employer had the 'specific intent to violate ERISA'". Clark v. Resistoflex Company, A division of Unidynamics Corporation, 854 F.2d 762, 770 (5th Cir. 1988) (quoting Gavalik v. Continental Can Company, 812 F.2d 834, 851 (3rd Cir.), cert. denied, 484

U.S. 979, 108 S.Ct. 495 (1987)). Proof of a mere incidental loss of benefits as a result of being terminated will not constitute a violation of §1140. Dewitt v. Penn-Del Directory Corporation, 106 F.3d 514, 522-23 (3rd Cir. 1997). "Consequently, to recover under section 510, the employee must show that the employer made a conscious decision to interfere with the employee's attainment of pension eligibility or additional benefits." Id. at 523. A prima facie case under Section 510 of ERISA requires additional evidence suggesting that pension interference was a motivating factor. Id.

Other than the mere fact that he was included in the RIF which occurred eighteen months prior to vesting, plaintiff has come forward with no credible summary judgment evidence which creates a factual dispute as to whether the defendant had the specific intent to violate his ERISA rights. The evidence of record po9ints only to an incidental loss of benefits, the kind that occurs every time an ERISA employer discharges an employee. Such proof is insufficient to set forth a prima facie case of an ERISA violation. Dewitt, 106 F.3d at 523. Summary judgment on this claim will be granted as well.

Finally, defendants move for summary judgment ton the constructive discharge claim raised in paragraph 35 of plaintiff's complaint, arguing that plaintiff did not resign but was terminated as a result of the RIF; that the working conditions of which he complains were not so intolerable that a reasonable person in plaintiff's position would have felt compelled to resign; and, that plaintiff testified that gender discrimination played no part in the RIF.

The fatal flaw of plaintiff's constructive discharge claim is that he did not resign but was terminated as a result of the RIF. At any rate, having considered the factors set forth in Barrow v. New Orleans Steamship Association, 10 F.3d 292, 297 (5th Cir. 1994), the Court is unpersuaded that a reasonable employee in plaintiff's

position would have felt compelled to resign. See also Boze v. Branstetter, 912 F.2d 801, 805-06 (5th Cir. 1990). This claim, too, is ripe for summary judgment.[9]

For the foregoing reasons, it is ordered that defendant's motion for summary judgment is granted and that plaintiff's suit is dismissed with prejudice. Judgment will be entered accordingly.

New Orleans, Louisiana, this 14 day of January, 2000.

ALMA L. CHASEZ
UNITED STATES MAGISTRATE JUDGE

[9]In his opposition to defendants' motion for summary judgment, plaintiff concedes that he does not have a viable claim of racial discrimination. (Rec. doc. 63, p. 3).

LOUISIANA REVISED STATUTES
TITLE 23. LABOR AND WORKERS' COMPENSATION
CHAPTER 8. LABOR ORGANIZATIONS AND LABOR DISPUTES
PART V. PUBLIC TRANSPORTATION FACILITIES

La. R.S. 23:890. Labor policy

A. The Legislature of Louisiana recognizes and hereby affirms that when a municipality, transit authority or other authority organized for the purpose acquires and/or operates public transportation facilities, it also acquires the problem of formulating a labor policy for its new employees, which is particularly difficult when an established bargaining relationship has prevailed under private ownership. It is further recognized that in the change from private to public improvement as little change as possible in the employer-employee relationship should be effected, to the end that employees of publicly owned transit facilities in the State of Louisiana should enjoy a system of labor relations close to that prevailing in private industry.

B. Municipalities within the State of Louisiana hereafter acquiring, owning and/or operating public transportation facilities shall deal with and enter into written contracts with all employees of the said transportation facility, except executive and administrative employees, through accredited representatives of such employees or representatives of any labor organization authorized to act for such employees, concerning wages, salaries, hours, working conditions and pension or retirement provisions; provided, nothing herein shall be construed to be hours of labor in excess of those provided by law or to permit working conditions prohibited by law. Such municipality hereafter acquiring, owning and/or operating such

public transportation facility shall arbitrate any dispute arising over wages, salaries, hours, working conditions or pension or retirement provisions in accordance with the procedure hereafter set forth.

C. Whenever a municipality, transit authority, or other authority organized for the purpose shall acquire an existing public transportation system, all of the employees of such system to the extent necessary for the operation thereof, except executive or administrative officers and employees, shall be transferred to and appointed as employees of the said municipality, transit authority or other authority and these employees shall be given sick leave, seniority, vacation and pension credits in accordance with the records of the acquired system. Members and beneficiaries of any pension or retirement system or other benefits established by the aforesaid transportation system shall continue to have the rights, privileges, benefits, obligations and status with respect to such established system. The terms, conditions, and provisions of any pension or retirement system or of any amendment or modification thereof affecting employees may be established, amended or modified by agreement with such employees or their duly authorized representative.

D. Employees of such public transportation systems hereafter acquired by any such municipality, transit authority or other authority organized for the purpose shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Notwithstanding any other provision of this Part, whenever a majority of the said employees in any such suit appropriate for collective bargaining indicate a

desire to be represented by a labor organization, the said municipality, transit authority or other authority organized for the purpose upon determining that such labor organization represents the said employees, shall enter into a written contract with the accredited representative of such employees governing wages, salaries, hours and working conditions and pension and retirement provisions.

E. Whenever any labor dispute arises in the operation of any public transportation facility hereafter acquired by any municipality, transit authority or other authority organized for the purpose, in the state of Louisiana, and collective bargaining does not result in an agreement the aforesaid public authority shall offer to submit such dispute to arbitration by a board composed of three persons, one appointed by the authority, one appointed by the labor organization representing the employees and a third member to be agreed upon by the labor organization and the authority. The member selected by the labor organization and the authority shall act as chairman of the board. The determination of the majority of the board of arbitration thus established shall be final and binding on all matters in dispute. If after a period of ten days from the date of the appointment of the two arbitrators representing the authority and the labor organization the third arbitrator has not been selected then either arbitrator may request the American Arbitration Association to furnish a list of five persons from which the third arbitrator shall be selected. The arbitrator appointed by the authority and the labor organization promptly after the receipt of such list shall determine by lot the order of elimination and thereafter each shall in that order alternately eliminate one name until only one name remains. The remaining person on the list shall be the third arbitrator. The term "labor dispute" shall be broadly construed and shall

include any controversy concerning wages, salaries, hours, working conditions or benefits including health and welfare, sick leave, insurance or pension or retirement provisions but not limited thereto and including any controversy concerning any differences or questions that may arise between the parties including but not limited to the making or maintaining of collective bargaining agreements, the terms to be included in such agreements and the interpretation or application of such collective bargaining agreements and any grievances that may arise. Each party shall pay one-half of the expenses of such arbitration.

F. Employees of such publicly owned and/or operated transportation systems hereafter acquired may authorize and upon such authorization the aforesaid municipality, transit authority or other authority organized for the purpose may make deductions from wages and salaries of such employees:

(1) Pursuant to a collective bargaining agreement with a duly designated or certified labor organization for the payment of union dues, fees or assessments.

(2) For the payment of contributions pursuant to any health and welfare plan or pension or retirement plan, and

(3) For any purposes for which deductions may be authorized by employees of any private employer.

G. This Part shall be construed liberally to effectuate the purposes for which same is enacted and should any part hereof be declared unconstitutional it shall not affect the remaining portions.

(2)

Supreme Court, U.S.
FILED
DEC 21 2000
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No. 00-824

In The

Supreme Court of the United States

SYLVESTER PALMER,

Petitioner,

v.

TRANSIT MANAGEMENT OF SOUTHEAST LOUISIANA (TMSEL); REGIONAL TRANSIT AUTHORITY; AMALGAMATED TRANSIT UNION, Division 1611; UNIDENTIFIED PARTY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MARSHA J. HOPPER
General Counsel for Transit Management of Southeast Louisiana, Inc.
6700 Plaza Drive
New Orleans, Louisiana 70127
(504) 248-3857

ROBERT L. CLAYTON
MICHAEL M. DURAN*
SHERRY L. TEW
EDWARD R. WICKER, JR.
MILLING BENSON WOODWARD, L.L.P.
909 Poydras Street, Suite 2300
New Orleans, Louisiana 70112-1010
Telephone: (504) 569-7000

Attorneys for Respondent, Transit Management of Southeast Louisiana

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

38 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

RESPONDENT'S BRIEF IN OPPOSITION 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. THIS COURT HAS NO JURISDICTION TO CONSIDER PETITIONER'S ARGUMENTS 3

II. THE PETITIONER HAS MADE MISREPRESENTATIONS IN HIS PETITION AND OFFERED NEW THEORIES AND FACTS TO THIS COURT BEYOND THE RECORD 4

III. THE DISTRICT COURT'S DECISION TO DISMISS PETITIONER'S CASE WAS CORRECT ... 8

A. The District Court Did Not Err When It Dismissed Petitioner's Breach of Contract Claims 8

1. Palmer Was Not a Member of the Union and Thus Was an At-Will Employee and Did Not "Enjoy" Seniority Rights 9

2. Because Petitioner Was an At-Will Employee and Not a Member of the Union, the District Court's Decision to Dismiss His Breach of Contract Claim Was Correct Under Louisiana Law 10

3. Louisiana Revised Statute 23:890(c) and the 13(c) Agreement Between NOPSI and TMSEL Did Not "Protect" the Petitioner's Seniority Rights 11

TABLE OF CONTENTS – Continued

Page

a. The petitioner was not a "covered employee" under the 13(c) agreement 13

b. Even if petitioner was covered under 13(c), the 13(c) agreement would not have protected the petitioner from the 1997 RIF 14

c. Even if petitioner was covered under the 13(c) agreement, petitioner did not exhaust his administrative remedies under the 13(c) agreement 15

B. The District Court Did Not Err When It Dismissed Petitioner's Claims of Gender Discrimination 15

1. Petitioner cannot show gender discrimination in the 1997 RIF 15

2. The district court made the correct analysis that Francis Bowie was transferred from the Maintenance Department to the Transportation Department at no change in salary 19

3. The petitioner's claim that TMSEL devised an elaborate conspiracy that ultimately led to his termination is frivolous and not accepted by either the Courts or the National Labor Relations Board ("NLRB") 20

C. The District Court's Decision Dismissing Petitioner's Retaliatory Firing Claim Was Proper 22

TABLE OF CONTENTS – Continued

Page

1. The district court is correct that the petitioner failed to file a retaliation claim with the EEOC 23

2. Even if it was assumed that petitioner had exhausted his administrative remedies available through the EEOC, the district court would have properly dismissed his retaliation claim on the merits 24

   a. The petitioner cannot prove that he was engaged in an activity protected by Title VII 25

   b. The alleged acts of retaliation do not rise to the level of an ultimate employment decision 25

E. The Trial Court Did Not Err in Dismissing Petitioner's Claims of Intentional Infliction of Emotional Distress Under Louisiana Law 26

F. The ERISA Claim Was Properly Dismissed Because the Petitioner Had Absolutely No Evidence Establishing That TMSEL Specifically Intended to Interfere With His Benefits 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Ballaron v. Equitable Shipyards, Inc., 521 So. 2d 481 (La. 4th Ct. App. 1988) 10

Barbour v. Dynamics Research Corp., 63 F.3d 32 (1st Cir. 1995), *cert. denied*, 516 U.S. 1113 (1996) 28

Barrow v. New Orleans Steamship Ass'n, 932 F.2d 473 (5th Cir. 1991) 24

Beaver Valley Canning Co. v. NLRB, 332 F.2d 429 (8th Cir. 1964) 21

Benningfield v. City of Houston, 157 F.3d 369 (5th Cir. 1998), *cert. denied*, 526 U.S. 1065 (1999) 26

Booth v. Intertrans Corp., No. 94-2359, 1995 U.S. Dist. LEXIS 7593 (E.D. La. 1995) 26, 27

Brannan v. Wyeth Labs., Inc., 526 So. 2d 1101 (La. 1988) 10

Braxton v. United States, 500 U.S. 344 (1991) 3

Burch v. Reese, No. 88-5191, 1990 U.S. Dist. LEXIS 3112 (E.D. La. 1990) 12, 13

Burger v. Central Apartment Management, Inc., 168 F.3d 875 (5th Cir. 1999) 20

Clark v. Coats & Clark, Inc., 990 F.2d 1217 (11th Cir. 1993) 28, 29

Clark v. Resistoflex Co., 854 F.2d 762 (5th Cir. 1988) 28

Crompton-Richmond Co. v. Smith, 392 F.2d 577 (3d Cir. 1967) 5

Dewitt v. Penn-Del Directory Corp., 106 F.3d 514 (3rd Cir. 1997) 28, 29

TABLE OF AUTHORITIES – Continued

Page

Dister v. The Continental Group, 859 F.2d 1108 (2nd Cir. 1988) 28, 29

Dollis v. Rubin, 77 F.3d 777 (5th Cir. 1995) 24, 26

Douglas v. Dyn McDermott Petroleum Operations Co., 144 F.3d 364 (5th Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999) 25

Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451 (1992) 4

Fine v. GAF Chemical Corporation, 995 F.2d 576 (5th Cir. 1993) 24

Gil v. Metal Service Corp., 412 So. 2d 706 (La. 4th Ct. App. 1982) 10

Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667 (5th Cir. 1995) 5

Henson v. Liggett Group, Inc., 61 F.3d 270 (4th Cir. 1995) 28

Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, 457 U.S. 15 (1982) 11

Jones v. Flagship Int'l, 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987) 25

Keller v. Sisters of Charity, 597 So. 2d 1113 (La. 2nd Ct. App. 1992) 10, 11

Konowitz v. Schnadig Corp., 965 F.2d 230 (7th Cir. 1992) 21

Leger v. Tyson Foods, Inc., 670 So. 2d 397 (La. 3rd Ct. App. 1996) 10, 11

Liberles v. County of Cook, 709 F.2d 1122 (7th Cir. 1983) 5

TABLE OF AUTHORITIES – Continued

Page

Lutheran Home of Kendallville, Ind., 264 NLRB 525 (1982) 22

Macy's Missouri-Kansas Division v. NLRB, 389 F.2d 835 (8th Cir. 1968) 21

Nissho-Iwai American Corp. v. Kline, 845 F.2d 1300 (5th Cir. 1988) 5

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 21

Palucki v. Sears, Roebuck & Co., 879 F.2d 1568 (7th Cir. 1989) 21

Ramsey v. United States, 463 F.2d 815 (D.C. Cir. 1972), *cert. denied*, 421 U.S. 913 (1975) 5

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 3, 4

Schwarz v. Administrators of the Tulane Educ. Fund, 699 So. 2d 895 (La. 4th Ct. App. 1997) 11

St. Louis Tel. Employees Credit Union and Office and Prof'l Employees Int'l Union, 273 NLRB 625 (1984) 22

Teumer v. General Motors Corp., 34 F.3d 542 (7th Cir. 1994) 28

Thebner v. Xerox Corp., 480 So. 2d 454 (La. 3rd Ct. App. 1985) 10, 11

Town of New Roads v. Dukes, 312 So. 2d 890 (La. App. 1st Cir. 1975), *rev'd on other grounds, Davis v. Henry*, 555 So. 2d 457 (La. 1990) 12

United States v. Winstar Corp., 518 U.S. 839 (1996) 4

United Transp. Union v. Brock, 815 F.2d 1562 (D.C. Cir. 1987) 13

TABLE OF AUTHORITIES – Continued

Page

Watts v. Kroger Co., 170 F.3d 505 (5th Cir. 1999) 20

Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) 16

Williams v. Touro Infirmary, 578 So. 2d 1006 (La. 4th Ct. App. 1991) 10

STATUTES AND RULES

28 U.S.C. §1254(1) 1, 3

29 U.S.C. §1140 28

49 U.S.C. §5333 11

S. Ct. R. 10 ..... 3, 4

S. Ct. R. 10(a) 1, 3

S. Ct. R. 10(b) 4

S. Ct. R. 10(c) 1, 3, 4

S. Ct. R. 15.2 5

La. Rev. Stat. 23:890 ..... 6, 11

Civil Rights Act of 1964, §701, *et seq.*, *as amended by*, 42 U.S.C. §2000e, *et seq.* 23

OTHER AUTHORITY

C. Wright, A. Miller & M. Kane, 10A *Federal Practice and Procedure: Civil 2d* §2716 (1998) 5

RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests that the Court deny the Petition for Writ of Certiorari seeking review of the Opinion of the Court of Appeals for the Fifth Circuit, Docket No. 00-30184, which summarily affirmed the District Court's Judgment, and the Opinion of United States Magistrate Judge Alma L. Chasez, Docket No. 98-0594. The Opinion of the Court of Appeals for the Fifth Circuit is reproduced commencing at page 1a of the Petition and is herein referred to as the Court of Appeals Opinion or Decision. The Opinion of United States Magistrate Judge Alma L. Chasez is reproduced commencing at page 7a of the Petition and is herein referred to as the District Court's Opinion or Decision.

STATEMENT OF JURISDICTION

The Court should not exercise jurisdiction over this case pursuant to 28 U.S.C. §1254 or Supreme Court Rule 10 (a) or (c) because there is neither an important federal question involved nor does the Court of Appeals' opinion or that of the District Court conflict with any decision of this Court. Moreover, the Petition consists of alleged factual errors, which, under the Court's own Rule 10, rarely support the granting of a petition of writ of certiorari.

STATEMENT OF THE CASE

In July of 1978, the petitioner was hired by New Orleans Public Service, Inc. ("NOPSI") in the capacity of operator (bus driver), a union position. Five years later, NOPSI was acquired by the Regional Transit Authority ("RTA"). Petitioner continued to work as an operator for Transit Management of Southeast Louisiana ("TMSEL") in service to the RTA. By 1995, the petitioner had worked

himself up to the position of instructor within the Transportation Department, another union position. On October 6, 1995, the petitioner was transferred from the instructor position to the position of assignment supervisor in the Maintenance Department, a non-union position. Along with the petitioner, three male instructors and one female run dispatcher, Dale Newman, were also reassigned to the Maintenance Department. On October 13, 1995, the petitioner filed an internal grievance wherein he complained that his lateral transfer had operated to deprive him of the benefit of seniority in the selection of work schedules and vacation time.[1]

Thereafter, the petitioner alleged that he received constant shift changes, cancellation of vacation days, and substandard evaluations.[2] In December of 1995, Newman was transferred back to the Transportation Department to the position of run dispatcher, a job she had previously held, at no change in salary. The following month, Francis Bowie, a female, was transferred to the Maintenance Department as assignment supervisor. The petitioner alleged that Bowie, too, received preferential treatment in the selection of work schedules, training, and vacation time. On December 30, 1996, Bowie was transferred to the

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[1] The substance of the petitioner's grievance, as reflected on the form that he completed for that purpose, was that shift schedules and vacation time were determined alphabetically subsequent to his transfer to the Maintenance Department, contrary to being determined on the basis of seniority. Although not specifically mentioned in the written grievance form, the petitioner also alleged that his "seniority" rights were violated because Newman received better shift assignments and vacation schedules following their reassignment to the Maintenance Department.

[2] The petitioner made no allegation that these occurrences resulted in a change of his job duties or loss of pay.

Para-Transit Department as a senior run dispatcher with no change in salary.

Subsequently, on March 31, 1997, the petitioner, along with twenty female employees and eight other male employees, was terminated as a result of a reduction in force ("RIF"). On June 9, 1997, the petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). The standardized charge form signed by the petitioner indicates that the alleged discrimination was based on gender alone and that the acts involved occurred between January 1, 1997 and March 31, 1997.[3]

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER PETITIONER'S ARGUMENTS.

This Court does not review decisions of a United States Court of Appeals unless an important federal question has been decided in conflict with another United States Court of Appeals or state court of last resort or this Honorable Court. 28 U.S.C. §1254(1); S. Ct. R. 10(a) and (c). *See Braxton v. United States*, 500 U.S. 344, 347 (1991). Moreover, a "petition for a writ of certiorari will be granted only for compelling reasons." S. Ct. R. 10. In light of this, the Court will only grant review where there are "special and important reasons" to do so. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

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[3] Notwithstanding the allegations contained within the charge of discrimination, the petitioner testified at his deposition that gender discrimination played no part in the RIF.

The petitioner, however, did not – because he could not – assert in his Petition any "compelling," "special," or "important" reason regarding why this Court should grant review of this matter. *See* S. Ct. R. 10; *Rice*, 349 U.S. at 74. He did not – because he could not – invoke any of the grounds this Court takes into account in deciding whether to grant review. *See* S. Ct. R. 10(b) and (c). Rather, the petitioner's entire Petition focused on his contention that neither the federal district court nor the Fifth Circuit properly considered the *facts*. But the truly significant fact is that a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." S. Ct. R. 10.

There is no jurisdictional basis, and none has been invoked, which supports the petitioner's writ and which, therefore, allows this Court to grant review. The petitioner **has not cited – nor could he cite** – any important questions of federal law in this matter that are decided differently among the Courts of Appeals, by a state court of last resort, or any decision in conflict with precedent of this Court. The district court and the Fifth Circuit properly decided this case, and the petitioner's writ should be denied.

II.

THE PETITIONER HAS MADE MISREPRESENTATIONS IN HIS PETITION AND OFFERED NEW THEORIES AND FACTS TO THIS COURT BEYOND THE RECORD.

On summary judgment, this Court may examine the record *de novo*. *United States v. Winstar Corp.*, 518 U.S. 839, 860 (1996); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466 (1992). However, it must limit its review

to those facts, exhibits, theories, depositions, and affidavits that were before the district court when it entered summary judgment for TMSEL. To be sure, the petitioner cannot now – for the first time before this Court – allege "new" facts and issues beyond the record to secure a reversal and remand of this matter. *See Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667 (5th Cir. 1995); *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300 (5th Cir. 1988); *Liberles v. County of Cook*, 709 F.2d 1122 (7th Cir. 1983); *Ramsey v. United States*, 463 F.2d 815 (D.C. Cir. 1972), *cert. denied*, 421 U.S. 913 (1975); and *Crompton-Richmond Co. v. Smith*, 392 F.2d 577 (3d Cir. 1967). *See also* C. Wright, A. Miller & M. Kane, 10A *Federal Practice and Procedure: Civil 2d* §2716 (1998). **Significantly, the circuits are uniform on this issue.**

Nonetheless, that is exactly what the petitioner has done: he has conjured up new facts and theories before this Court that were never alleged below. In accordance with Supreme Court Rules. *See* S. Ct. R. 15.2. TMSEL is obligated to point out the following misstatements of law and fact:

1. The petitioner has now alleged for the first time before this Court that TMSEL violated his employment contract by denying him seniority rights. *See* Petition at p. 11. In the lower courts, however, he claimed that his *lay-off* in 1997 violated his contract. The Court should not allow the petitioner to secure a reversal based upon this "new" theory of contract.
2. The Petition states, "TMSEL does not dispute that Palmer, an employee of 19 years, enjoyed seniority rights. . . . " *Ibid.* at p. 10. To the contrary, TMSEL submitted undisputed evidence to the district court, through the affidavit of union president Robert L.

Spencer, that the petitioner was not a member of the union, and thus, did not "enjoy seniority rights" as now claimed by the Petition.

3. The Petition states, "TMSEL could not dispute Palmer's seniority rights because these rights were protected by Louisiana Revised Statute 23:890 and by Palmer's employment contract." *Ibid.* at p. 10. As an at-will, non-union employee, petitioner's "seniority rights" were protected neither by that statute nor by any purported employment contract.

4. The Petition states, "TMSEL's *sole* argument in support of summary judgment dismissal of Palmer's breach of contract claim is that Palmer was an 'at-will' employee." *Ibid.* at pp. 10-11. This is yet another mischaracterization. It was not until *after* the Motion for Summary Judgment had been filed that the petitioner ever pled or even mentioned that he was allegedly protected by the 13(c) agreement. The petitioner first raised the issue of 13(c) in his Opposition to Motion, and then TMSEL refuted his position in its Reply Memorandum. Thus, for the petitioner to now assert that TMSEL's *sole* basis for summary judgment on the contract claim was that the petitioner was an "at-will" employee is not correct.

5. The petitioner stated that "TMSEL did not dispute the fact that Palmer was . . . denied promotions back to the union position that he held for five years. . . . " *See* Petition at p. 17. TMSEL did, in fact, deny that the petitioner was denied promotions and

proved that the "promotions" that the Petition referenced were, in fact, transfers, which are not adverse employment actions under Title VII.

6. The Petition states, "TMSEL does not dispute that Palmer was contractually entitled to preferences based on seniority, including most importantly preferences in promotions and rehiring." *Ibid.* TMSEL has clearly disputed the fact that the petitioner was contractually entitled to preferences based on seniority. TMSEL denied the fact that the petitioner had been denied promotions and made clear that the petitioner had the opportunity to be considered for rehire, but *never* went to apply for such positions.

7. The Petition urged that "TMSEL acknowledges that Bowie and Newman, two females with less seniority than Palmer, were transferred back to the Transportation Department." *Ibid.* at p. 17. Whether Bowie and Newman had less seniority than petitioner was not in the record for TMSEL to dispute and not an issue brought before the District Court.

8. The Petition states, "TMSEL does not dispute the fact that . . . if Palmer had been given an equal opportunity to transfer back to a union position in the Transportation Department, he would have been secure from the 1997 layoff. . . . " *Ibid.* TMSEL certainly has always pled that petitioner was given an "equal opportunity" while employed by TMSEL. Furthermore, there is nothing in the record that proves that members of the union were not laid off in the 1997 RIF.

9. The Petition states, "TMSEL does not dispute the fact that because Bowie and Newman were transferred back to the Transportation Department, they were not laid off." There is nothing in the record to show that Bowie and Newman were transferred to allegedly protected union positions or that they have not been laid off by TMSEL.

Regarding his various claims, the petitioner has attempted to create legal and factual controversies before this Court by alleging "new" facts and theories (not raised in the district court); this is clearly not allowed. The law is clear that this Court's review is limited to the record before the district court when it entered summary judgment for TMSEL. This Court cannot now consider issues **beyond the record.**

III.

THE DISTRICT COURT'S DECISION TO DISMISS PETITIONER'S CASE WAS CORRECT.

A. The District Court Did Not Err When It Dismissed Petitioner's Breach of Contract Claims.

For the first time *ever*, the petitioner now argues that the District Court ignored uncontested facts showing that TMSEL violated his contractually protected seniority rights by denying petitioner the opportunity to transfer to the Transportation Department.

If the petitioner had been a member of the union, he may have had a valid complaint through the union arbitration process or the National Labor Relations Act;[4] however, petitioner **WAS NOT A MEMBER OF THE**

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[4] The petitioner has never filed a charge with the National Labor Relations Board.

UNION when the events he is complaining of occurred. Moreover, under Louisiana law, unless an employee is contractually obligated to be employed for a fixed term, the employee is considered "at-will." As explained more fully below, none of the documents referenced by the Petitioner altered his status as an at-will employee, and TMSEL had no legal obligation to transfer the petitioner because of his seniority rights or otherwise.

1. Palmer Was Not a Member of the Union and Thus Was an At-Will Employee and Did Not "Enjoy" Seniority Rights.

Presumably, when the Petition states that the petitioner has "seniority rights," it means that he was entitled to these rights by virtue of his membership in the union. Nevertheless, it is an uncontested fact that at the time petitioner requested the transfers and at the time he was RIF'd, he was not a member of the union and was an at-will employee.

TMSEL submitted to the district court an affidavit of the union president which unequivocally established that as an assignment supervisor, the petitioner did not hold a position covered by the union's collective bargaining agreement (CBA) with TMSEL. Moreover, petitioner never contested this fact to the district court. Therefore, the district court's determination that petitioner was an at-will employee and not a member of the union at the time of the RIF was not erroneous. This Court, therefore, has no basis whatsoever for questioning the validity of the Summary Judgment granted.

2. Because Petitioner Was an At-Will Employee and Not a Member of the Union, the District Court's Decision to Dismiss His Breach of Contract Claim Was Correct Under Louisiana Law.

Louisiana law provides that when a person is employed for an indefinite period of time, he is considered an at-will employee. *Brannan v. Wyeth Labs., Inc.*, 526 So. 2d 1101, 1104 (La. 1988). An employee not hired for a fixed term may be terminated without cause at any time and that "[a]bsent a specific contract or agreement establishing a fixed term of employment, an employer is at liberty to dismiss an employee at any time for any reason without incurring liability for the discharge." *Thebner v. Xerox Corp.*, 480 So. 2d 454, 457 (La. 3rd Ct. App. 1985); *Leger v. Tyson Foods, Inc.*, 670 So. 2d 397 (La. 3rd Ct. App. 1996); and *Keller v. Sisters of Charity*, 597 So. 2d 1113 (La. 2nd Ct. App. 1992). *See also Williams v. Touro Infirmary*, 578 So. 2d 1006 (La. 4th Ct. App. 1991); *Ballaron v. Equitable Shipyards, Inc.*, 521 So. 2d 481, 482 (La. 4th Ct. App. 1988); and *Gil v. Metal Service Corp.*, 412 So. 2d 706, 707 (La. 4th Ct. App. 1982).

The petitioner contended that TMSEL was contractually obligated to transfer him to a union position under the following documents: 1) the CBA between TMSEL and ATU Local No. 1611; 2) the 13(c) agreement; 3) the TMSEL employee handbook; 4) a letter from Leroy Bailey, General Manager to Robert Spencer, President ATU Local Union 1611, dated October 3, 1995; and 5) statements from union representatives. None of these documents or statements provide for a fixed term of employment for the Petitioner, nor has he alleged that he was employed for a fixed term.

Personnel policy manuals do not constitute binding employment contracts. *Thebner*, 480 So. 2d at 457. *See also Schwarz v. Administrators of the Tulane Educ. Fund*, 699 So. 2d 895 (La. 4th Ct. App. 1997); *Keller*, 597 So. 2d at 1113-15. In fact, there is "no Louisiana jurisprudence in which an employee manual has been held to confer *any* contractual rights upon an employee or to create *any* exception to the employment-at-will doctrine." *Leger*, 670 So. 2d at 402.

Since the petitioner was not employed for a fixed term, he was an at-will employee and did not enjoy any contractual right to any special status regarding seniority rights.

3. Louisiana Revised Statute 23:890(c) and the 13(c) Agreement Between NOPSI and TMSEL Did Not "Protect" the Petitioner's Seniority Rights.

The petitioner argues that his "seniority rights" were "protected" based upon selected sections of La. Rev. Stat. 23:890. When this statute is viewed in its entirety, however, it is clear that §890 was promulgated in conjunction with the Urban Mass Transportation Act (UMTA) and was only intended to cover employees who are members of a union. *See* 49 U.S.C. §5333 (formerly §1609).

In an effort to protect the collective bargaining rights of transit workers, Congress created the UMTA. *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982). Section 13(c) of the UMTA mandates that a local government like the City of New Orleans make arrangements to preserve transit workers' existing collective bargaining rights before it may receive federal financial assistance to acquire a privately owned transit company. *Id.* at 16; 49 U.S.C. §5333.

Section 890 was enacted the same year as the UMTA and was intended to be a companion statute to UMTA. The only federal court previously to address §890 was the Eastern District of Louisiana in an unpublished opinion, *Burch v. Reese,* No. 88-5191, 1990 U.S. Dist. LEXIS 3112 (E.D. La. 1990). In that decision, the district court determined that both the Louisiana and federal statutes are meant simply to require municipalities to honor CBAs negotiated between employees and their private employers, when those municipalities acquire a transit system. *Id.* The federal statute conditions federal funding on honoring the CBAs, while the state statute simply requires honoring the agreement. *Id.*

The only state case to address §890 recognized that it authorized "municipalities, transit authorities or other authorities to recognize collective bargaining agents of operating and other transit personnel and to enter into contract with such representatives. . . . " *Town of New Roads v. Dukes,* 312 So. 2d 890, 894 n.1 (La. App. 1st Cir. 1975), *rev'd on other grounds, Davis v. Henry,* 555 So. 2d 457 (La. 1990). Because §890 and 13(c) are companion statutes, they will be addressed together concerning petitioner's argument.

Petitioner's reliance on the 13(c) agreement and §890 is flawed for these reasons: 1) because he was not a member of the union, the petitioner was not a covered employee under the 13(c) agreement; 2) even if it is assumed that the petitioner was covered by the 13(c) agreement, the terms of the agreement do not prevent him from being discharged; and 3) even if it is assumed that the petitioner was covered by the 13(c) agreement, he failed to exhaust his administrative remedies.

a. The petitioner was not a "covered employee" under the 13(c) agreement.

Petitioner was not a "covered employee" under either the provisions of the 13(c) agreement itself or those of §890. In *Burch*, the Court determined that 13(c) agreements apply only to union members at the time of the alleged breach. The plaintiffs sued TMSEL on an alleged breach of **the same 13(c) agreement** that is at issue in this matter. Since none of the plaintiffs was affiliated with the union at the time of termination, the 13(c) agreement cause of action was dismissed. *Burch*, 1990 U.S. Dist. LEXIS 3112, at *12.

In *United Transp. Union v. Brock*, the D.C. Circuit held that a 13(c) agreement provided no protection for transit employees who did not have any collective bargaining rights. *United Transp. Union v. Brock*, 815 F.2d 1562, 1564-66 (D.C. Cir. 1987). Seven years before the public transit authority applied for federal assistance, the employees lost their collective bargaining rights for reasons wholly unrelated to the UMTA. *Id.* Because the employees lost their collective bargaining rights for a reason unrelated to UMTA, the Court found that there were no rights to be protected or continued under 13(c). *Id.* Therefore, both of these cases made clear that in order for the a 13(c) agreement to apply, the employee has to be a member of a union.

The petitioner never disputed at the district court level that he was not a member of the union. Consequently, the 13(c) agreement did not apply to him and the district court's decision to dismiss his contract claim was correct.

b. Even if petitioner was covered under 13(c), the 13(c) agreement would not have protected the petitioner from the 1997 RIF.

The petitioner argues that the 13(c) agreement protects all former NOPSI employees from **ever being laid off or terminated by TMSEL**. *See* Petition at p. 14. This is simply not the case. In fact, the language of the 13(c) agreement expressly provides for potential layoffs. On this point, at least, the petitioner does not misstate the lower court records, but remains ominously silent:

> Any employee in the bargaining unit represented by the Union who has been terminated or laid off for lack of work as a result of the Project shall be granted priority of employment or reemployment to fill any vacant position on the transit system for which he is, or by training or re-training can become qualified.

The record shows that petitioner made NO EFFORT to avail himself of any re-hire opportunities offered him in his layoff notification letter. Moreover, the 13(c) agreement specifically provides for what happens when TMSEL contemplates a change that will result in the displacement of employees:

> In the event the Company contemplates any change in its organization or operations which will result in the dismissal or displacement of employees, or rearrangement of the working forces represented by the Union as a result of the Project, the Company shall give reasonable written notice of such intended change to the Union.

Not only do these provisions from the 13(c) agreement directly contradict the petitioner's arguments, but the petitioner utterly failed to cite language in the 13(c)

agreement that supports his claim. Therefore, the petitioner was never – even as a union member – protected from potential layoffs by the 13(c) agreement.

c. Even if petitioner was covered under the 13(c) agreement, petitioner did not exhaust his administrative remedies under the 13(c) agreement.

Even if it is assumed that the petitioner was covered by the provisions of the 13(c) agreement, he failed to exhaust the administrative remedies afforded under the agreement. Paragraph 5 of the 13(c) agreement provides as follows: "The Company shall be financially responsible for the application of these conditions and will make the necessary arrangements with the Union to provide for mutually satisfactory claims handling procedure under this agreement." Because the petitioner did not exhaust his administrative remedies, his alleged 13(c) claim is without merit.

B. The District Court Did Not Err When It Dismissed Petitioner's Claims of Gender Discrimination.

In his second argument, the petitioner complains that his gender discrimination claim should not have been dismissed because: 1) he was laid off in the 1997 RIF, which resulted in a loss of benefits, and 2) that he was denied promotions back to safe harbor union positions.

1. Petitioner cannot show gender discrimination in the 1997 RIF.

The petitioner argues that the district court's decision should be overturned because it "ignored" uncontested

issues of fact when deciding petitioner's gender discrimination claim. The Petition fails to contradict the evidence that clearly proved that gender played no role in the 1997 RIF.

The Fifth Circuit in *Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982), articulated the *prima facie* elements to determine if the Age Discrimination in Employment Act (ADEA) was violated in a RIF: 1) the plaintiff was within the protected age group and he was adversely affected by defendant's employment decision; 2) the plaintiff must make a showing that he was qualified to assume another position at the time of discharge or demotion; and 3) the plaintiff must make some evidentiary showing from which the factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue. *Id.* at 129. The *Williams* Court did not place an affirmative duty upon an employer to accord special treatment to members of the protected group. *Id.* at 129-30.

If the same analysis is applied to petitioner's gender discrimination claim, he cannot prove a *prima facie* case. Title VII does not require that members of a certain gender group be protected from an adverse employment decision. If that were the standard, then every person who was discharged in March of 1997 would have a claim for gender discrimination – all of whom would be either men or women.

In fact, the uncontroverted evidence presented to the district court by TMSEL proves the opposite. In the March 31, 1997 RIF, some ***twenty* female** employees and **eight** other male employees were terminated at the same time. There is seemingly no evidence that shows that females were "favored" by the RIF. On the day petitioner was discharged, ***more than twice as many women than***

men were discharged in the RIF. As the trial court noted: if anything, males were treated preferentially in the RIF.

Moreover, petitioner's own deposition testimony shows that females were not treated favorably in the RIF. When petitioner was asked if there was a gender bias at the time of the RIF, his answer was undeniably "No":

> Q. Okay. Now, let me see if I can get this straight. Is your claim that there was unfair gender bias at work in the March of '97 when there was a reduction in force?
>
> A. No, sir. That's not what I'm saying.

Record 323.

The petitioner also testified that to the best of his knowledge, none of the females who had been laid off were subsequently rehired by TMSEL. Any suggestion that Bowie was strategically positioned to avoid the RIF because of her gender fails for two reasons: 1) there is no direct evidence of an intent on anyone's part at TMSEL to prefer Bowie over the petitioner because of her gender; and 2) any "indirect evidence" of discriminatory intent would have to be overshadowed by the undisputed statistical evidence which Magistrate Chasez relied on in finding that the RIF actually favored males.

The petitioner failed to produce any evidence demonstrating that petitioner's gender was a factor in his discharge. Petitioner does not show that significantly more men than women were discharged, he does not produce affidavits from other men who believe that their gender played a role in their discharge, and he cannot show that his gender had anything to do with his discharge.

The petitioner can only provide a laundry list of unsubstantiated facts, speculation, and innuendo to attempt to persuade this Court to grant his Petition. The

Petition states, "TMSEL does not dispute that Palmer was contractually entitled to preferences based on seniority." *See* Petition at p. 17. As stated earlier, TMSEL did indeed dispute the petitioner's contractual entitlement at the district court, and has argued earlier that petitioner is not entitled to any preferences based on any alleged contract.

The petitioner also argues that "TMSEL acknowledges that Bowie and Newman, two females with less seniority than Palmer, were transferred back to the Transportation Department." *See* Petition at p. 17. The record never establishes whether Bowie and Newman had less seniority than the petitioner. Accordingly, this fact is not in the record to support petitioner's argument.

Petitioner's "final and most important argument" in support of a reversal of the district court's decision was this: if petitioner would have been transferred back to a union position he would have been secure from the 1997 layoff, and Bowie and Newman were transferred back and were not laid off. *See* Petition at p. 18. There is no evidence in the record, however, that Bowie and Newman were transferred to union positions; there is no evidence in the record that Bowie and Newman were not laid off by TMSEL; and there is no evidence in the record that union employees were protected from layoffs. The entirety of petitioner's "last and most important" argument is built on speculation without corroborating evidence in the record.

Furthermore, there is the above cited testimonial evidence from the petitioner himself which states that gender did not play a role in his layoff. Significantly, in his Affidavit in Opposition to the Motion for Summary Judgment, petitioner failed to contradict or explain this deposition testimony. When the factual circumstances of record are reviewed in their totality, petitioner does not

have the grounds or the contradictory evidence to support a reversal of the district court's decision concerning his gender discrimination claim.

2. The district court made the correct analysis that Francis Bowie was transferred from the Maintenance Department to the Transportation Department at no change in salary.

Aside from the RIF that ended the petitioner's employment with TMSEL, the only thing approaching an actionable "adverse employment action" was what the petitioner has come to characterize as a discriminatory promotion of Francis Bowie. At the heart of his argument is the assertion that Frances Bowie's transfer was a "promotion" that carried a $2.00 per hour raise, which supposedly would elevate this action to an "adverse employment decision" under Title VII. The petitioner concluded that Bowie received a raise because TMSEL's Payroll Authorization, Control No. 106568 dated January 31, 1996, stated that her salary was $14.6829/hour, and TMSEL's Payroll Authorization Control No. 109357 dated August 8, 1997, stated that her salary was $16.6829/hour.

While it may appear that there is a discrepancy concerning Bowie's salary, the undisputed affidavit by Tamera Sylvain, TMSEL's Acting Director of Human Resources, established that the difference in the hourly rate between Control Numbers 106568 and 109357 was a typographical error. Furthermore, Sylvain's Affidavit was supported by undisputed payroll records which clearly showed that Bowie did not receive a pay raise in January or August of 1996 or at any other time. Bowie's salary remained at $14.6829/hour after her transfer, and she did not receive a raise as a result of her transfer. Consequently, the typographical mistake on form 106568 did

not constitute a "raise," and the transfer was not a "promotion."

Numerous actions commonly taken by employers are not considered adverse employment decisions for Title VII purposes. *See Burger v. Central Apartment Management, Inc.*, 168 F.3d 875, 879 (5th Cir. 1999) ("Refusing an employee's request for a purely lateral transfer does not qualify as an ultimate employment decision.") and *Watts v. Kroger Co.*, 170 F.3d 505, 512 (5th Cir. 1999) ("We have held, along with many of our sister circuits, that employment actions are not adverse where pay, benefits, and level of responsibility remain the same.").

Therefore, given that Bowie was simply transferred and did not receive a pay raise, the district court properly dismissed this claim.

3. The petitioner's claim that TMSEL devised an elaborate conspiracy that ultimately led to his termination is frivolous and not accepted by either the Courts or the National Labor Relations Board ("NLRB").

Petitioner's allegation concerning the RIF is the final event in his litany of claims suggesting that TMSEL was "out to get him." The constant theme of his Petition is that in 1995 TMSEL "conspired" to move him out of a union position into a management position ultimately to fire him in 1997, along with twenty-eight other TMSEL employees. Petitioner's reason for this alleged conspiracy: TMSEL favored women over men. Petitioner's scattergun of claims leads to nothing more than that there was a "conspiracy" among Leroy Bailey, Eddie Moore, Jerome Beasley, Dale Newman and Francis Bowie, with all of them out to discriminate against him because of his gender, i.e., because he was a *man*.

However, the courts are "skeptical of such elaborate plot theories." *Konowitz v. Schnadig Corp.*, 965 F.2d 230, 234 (7th Cir. 1992). In *Konowitz*, the plaintiff claimed that his promotion was the first step in his ultimate discharge that violated the Age Discrimination in Employment Act. *Id.* Nonetheless, the Seventh Circuit found this theory "imaginative at best;" the Court focused on the fact that the plaintiff was **promoted** in the company, which cut against the notion that the company harbored any ill-will or discriminatory intent towards the plaintiff. *Id.* Moreover, in *Palucki v. Sears, Roebuck & Co.*, the court affirmed summary judgment in favor of the employer where the plaintiff had argued that his promotion to division head, which entailed supervision of three departments, was a set-up to ensure his failure and facilitate his discharge. *Palucki v. Sears, Roebuck & Co.*, 879 F.2d 1568, 1570-71 (7th Cir. 1989). The Court called this an "*exceedingly* improbable plot." *Id.* at p. 1571.

Furthermore, the NLRB has recognized that employers have a fundamental right to assign employees to positions the employer deems, in the exercise of its managerial discretion, most expedient. Only if the NLRB finds proof that a particular transfer was made because the employee exercised rights guaranteed by the National Labor Relations Act will an employer's assignment be declared an unfair labor practice. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). It is well-established at the NLRB that the mere coincidence of an employee's union activity (or benefits) and his transfer will not support a charge of discrimination. *See Beaver Valley Canning Co. v. NLRB*, 332 F.2d 429 (8th Cir. 1964); and *Macy's Missouri-Kansas Division v. NLRB*, 389 F.2d 835 (8th Cir. 1968).

The NLRB further allows an employer to promote an employee out of a bargaining unit and into a supervisory position unless "the bargaining unit thereby suffers a significant loss of work." *Lutheran Home of Kendallville, Ind.*, 264 NLRB 525, 525 n.2 (1982). Where an employer "wishes to select a unit employee to be a supervisor, and the unit will not lose that employee's work, the NLRB does not find that the employer has a duty to bargain over the selection." *Id.* An employer may have an obligation to bargain with a union **only if** it reduces bargaining unit work. *See St. Louis Tel. Employees Credit Union and Office and Prof'l Employees Int'l Union*, 273 NLRB 625 (1984). The petitioner has never alleged that the union's work was reduced because of his promotion, and the petitioner **never** filed an unfair labor practice charge.

In a desperate attempt to save his case, the petitioner claims that TMSEL conspired to single him out and move him to a managerial position as part of a grand scheme to deny him benefits and ultimately fire the petitioner years later as part of a RIF. The petitioner had absolutely no proof of this. The district court correctly dismissed the matter.

C. The District Court's Decision Dismissing Petitioner's Retaliatory Firing Claim Was Proper.

The petitioner argued that he experienced retaliation from TMSEL management after filing a grievance on October 13, 1995. The district court concluded that petitioner's EEOC charge did not address events that occurred prior to 1997, and that there was no evidence in the record that the EEOC investigated events that occurred as far back as 1995. Therefore, the district court determined that it lacked jurisdiction over his retaliation

claim based on the petitioner's failure to exhaust administrative remedies.

It is the apparent argument of the petitioner that the district court failed to take into account that his 1997 layoff "grew out of" his 1995 union grievance. However, the petitioner has not pointed to one piece of evidence to show that this occurred. In contrast, the record unequivocally proves that the petitioner's EEOC charge stated nothing about his 1995[5] grievance and that his 1995 grievance stated nothing about gender discrimination.

1. The district court is correct that the petitioner failed to file a retaliation claim with the EEOC.

The petitioner alleged that he was retaliated against for filing an internal grievance at TMSEL on October 13, 1995. The grievance addressed issues concerning seniority for scheduling shifts and failed to mention any gender inequity issues. On June 9, 1997, the petitioner filed EEOC Charge No. 270970922 concerning alleged acts of gender discrimination. The Charge of Discrimination, however, makes no specific mention of the grievance of October 13, 1995. The petitioner never filed an EEOC charge concerning the October 13, 1995 grievance.

The filing of an administrative complaint is a jurisdictional prerequisite to bringing suit under Title VII. Civil Rights Act of 1964, §701 *et seq., as amended by,* 42 U.S.C. §2000e *et seq.* The Court has ancillary jurisdiction to hear a claim of retaliation even if it is not filed with the

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[5] On p. 22 of the Petition there appears the incorrect statement that the petitioner filed an EEOC complaint in 1995. In 1995, the petitioner filed an internal administrative grievance – not with the union – at TMSEL.

EEOC, "when it grows out of an administrative charge that is properly before the court." *Barrow v. New Orleans Steamship Ass'n*, 932 F.2d 473 (5th Cir. 1991), (quoting *Gupta v. East Texas State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981)). It is axiomatic that a plaintiff must exhaust available administrative remedies prior to filing suit under Title VII. *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995) (citing *Ray v. Freeman*, 626 F.2d 439, 442 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981)). Courts hearing Title VII claims may consider only those specific claims set forth in a charge of discrimination in any way related to the charge's allegations, limited only by the scope of the EEOC investigation that could reasonably be expected to grow out of the charge. *Id.*; *Fine v. GAF Chemical Corporation*, 995 F.2d 576, 578 (5th Cir. 1993).

The petitioner's retaliation claim, however, did not "grow out" of the EEOC administrative charge. The administrative charge speaks for itself: it concerned alleged events that occurred only in 1997. There was no evidence that the EEOC investigation extended to events as far back as 1995. Since there was nothing in the record to prove otherwise, the district court held that it was constrained to determine that it lacked jurisdiction over the petitioner's retaliation claim. Therefore, because the petitioner could not point to a single piece of evidence showing that the EEOC investigation extended to incidents in 1995, the district court's decision was correct.

2. Even if it was assumed that petitioner had exhausted his administrative remedies available through the EEOC, the district court would have properly dismissed his retaliation claim on the merits.

In order for petitioner to establish a *prima facie* case of retaliation under Title VII, he must show that: 1) he was

engaged in an activity protected by Title VII; 2) an adverse employment decision occurred; and 3) there was a causal connection between participation in the protected activity and the adverse employment decision. *Jones v. Flagship Int'l*, 793 F.2d 714, 724 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987).

a. The petitioner cannot prove that he was engaged in an activity protected by Title VII.

The first element of a retaliation claim requires the petitioner to prove that he was engaged in an activity protected by Title VII. *Douglas v. Dyn McDermott Petroleum Operations Co.*, 144 F.3d 364, 372 (5th Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999). The petitioner's grievance filed with the company on October 13, 1995 pertained to issues concerning the seniority among workers in the Maintenance Department. The filing of an internal grievance concerning seniority is not protected by Title VII. Thus, on its face, the petitioner's retaliation claim failed because the activity that he was engaged in was not one protected by Title VII.

b. The alleged acts of retaliation do not rise to the level of an ultimate employment decision.

In his deposition, the petitioner testified that TMSEL retaliated against him because TMSEL gave him different shifts, made false accusations, refused to pay sick time, and moved him to different departments in the area. Many actions commonly taken by employers are not considered "ultimate employment decisions" for Title VII

purposes. *See Dollis*, 77 F.3d at 782 (denials of administrative complaints and internal grievances were not ultimate employment decisions) and *Benningfield v. City of Houston*, 157 F.3d 369, 377 (5th Cir. 1998), *cert. denied*, 526 U.S. 1065 (1999) (changes in employee's work schedule, hours, and work load are administrative decisions that do not rise to the level of an ultimate employment decision under Title VII).

None of the actions complained of by the petitioner is an "ultimate employment decision." Because the petitioner could not prove the first two elements of a *prima facie* claim of retaliation, the district court's decision to dismiss this cause of action was correct.

E. The Trial Court Did Not Err in Dismissing Petitioner's Claims of Intentional Infliction of Emotional Distress Under Louisiana Law.

In Louisiana, in order for the petitioner to prevail on a claim for intentional infliction of emotional distress, the "conduct complained of must be so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Booth v. Intertrans Corp.*, No. 94-2359, 1995 U.S. Dist. LEXIS 7593 (E.D. La. 1995), (citing *Deus v. Allstate Insurance Co.*, 15 F.3d 506, 514 (5th Cir. 1994), quoting *White v. Monsanto*, 585 So. 2d 1205, 1209 (La. 1991)). Even if workplace conduct is calculated to cause some degree of mental anguish it will rarely be so severe as to rise to the level of "outrageous conduct." *Booth*, 1995 U.S. Dist. LEXIS at *14 (citing *Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649, 654 (5th Cir. 1994)). Thus, ordinary employment disputes, even those that concern discrimination under Title VII, will only rise to the level of intentional infliction of

emotional distress in highly unusual cases. *Booth*, 1995 U.S. Dist. LEXIS at *14, (citing *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1144 (5th Cir. 1991); *Dean v. Ford Motor Co.*, 885 F.2d 300, 304-07 (5th Cir. 1989)).

Even if accepted as true, none of the conduct alleged by petitioner rises to the level of actionable discrimination, and it certainly does not rise to the level of "beyond all possible bounds of decency." The events that the petitioner complained of are nothing more than ordinary employment disputes that occur daily at every company. According to the petitioner's own testimony, he disagreed with the scheduling of shifts; supervisors were uncivil to him at times; he did not get the days off that he wanted; and he allegedly had to report to another employee whom he viewed as his subordinate. These kinds of disagreements between employers and employees happen constantly and cannot be considered "atrocious and utterly intolerable in a civilized community." *Id.* The district court agreed and determined that the petitioner failed to come forward with any credible summary judgment evidence of conduct that was "outrageous in character . . . [and] atrocious and utterly intolerable in a civilized community." *See* District Court Opinion at p. 18a.

The petitioner now urges that if he can prove his gender discrimination claim, he can prove his intentional infliction of emotional distress claim. But one claim should not be dependent on another claim. The petitioner had a fair opportunity to present facts to substantiate his intentional infliction of emotional distress. The facts are the facts. Whether the petitioner can prove his gender discrimination claim should have no bearing on his intentional infliction of emotional distress claim. For these reasons, the District Court's Opinion should be upheld.

F. The ERISA Claim Was Properly Dismissed Because the Petitioner Had Absolutely No Evidence Establishing That TMSEL Specifically Intended to Interfere With His Benefits.

Section 510 of ERISA prohibits an employer from interfering with an employee's right to attain or receive benefits under a pension plan. 29 U.S.C. §1140. A plaintiff who seeks recovery under §510 must present evidence establishing that the employer **specifically intended** to violate ERISA. An employer's specific intent to interfere under §510 is not established merely by proving that an employee suffered an incidental loss to benefits as a result of a termination, for a loss of benefits occurs each time an employee is discharged. Therefore, additional evidence is needed to establish that the employer intended to interfere with the employee's ERISA rights. *See Barbour v. Dynamics Research Corp.*, 63 F.3d 32 (1st Cir. 1995), *cert. denied*, 516 U.S. 1113 (1996); *Dister v. The Continental Group*, 859 F.2d 1108 (2nd Cir. 1988); *Dewitt v. Penn-Del Directory Corp.*, 106 F.3d 514 (3rd Cir. 1997); *Henson v. Liggett Group, Inc.*, 61 F.3d 270 (4th Cir. 1995); *Clark v. Resistoflex Co.*, 854 F.2d 762 (5th Cir. 1988); *Teumer v. General Motors Corp.*, 34 F.3d 542 (7th Cir. 1994); and *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217 (11th Cir. 1993). **Significantly, the circuits are uniform on this issue.**

In the instant matter, the district court and the Fifth Circuit properly found no evidence in the record that TMSEL **specifically intended** to violate the petitioner's ERISA rights; rather, they determined that his ERISA rights were affected only as a consequence of his discharge. The petitioner's allegations rested solely on the suggestion that his termination as a result of a RIF occurred 18 months before his pension allegedly vested. But to "recover under section 510, the employee must show that the employer made a **conscious decision** to

interfere with the employee's attainment of pension eligibility or additional benefits." *Dewitt*, 106 F.3d at 23 (emphasis added). The petitioner never came forward with evidence establishing that TMSEL made a "conscious decision" to specifically deny him his ERISA rights. To the contrary, he was terminated as part of a RIF along with dozens of other employees.

In the same vein, in *Clark*, the Eleventh Circuit held that a plaintiff was required to show more than the fact that he was terminated as a result of a RIF to support his claim that his employer intentionally interfered with his ERISA rights. Because he could not do so, and because the workforce reduction was a legitimate attempt to cut costs, the court found that he failed to establish a *prima facie* case of a §510 violation. *Clark*, 990 F.2d at 1225. *See also Dister*, 859 F.2d at 1111 ("Plaintiff is required to prove more than the single fact that his termination precluded him from vesting into the . . . Plan; he must demonstrate [an] unlawful purpose in firing him").

Just as the plaintiff in *Clark* could not prove specific intent by merely claiming he was fired as part of a RIF, nor can the petitioner in the instant matter. Likewise, the fact the petitioner was terminated only 18 months before his pension allegedly vested (and there is *no record evidence* that any "vesting" was to occur) does not support his claim that TMSEL **specifically intended** to interfere with his ERISA rights. *See Dewitt*, 106 F.3d at 23. This evidence by itself was insufficient to create a factual dispute as to whether TMSEL had the specific intent to violate §510. As the record is devoid of any proof of specific intent as required under §510, the district court properly dismissed the matter.

CONCLUSION

This case is not "writ worthy." The petitioner has failed to show that the district court's determination is even arguably incorrect, much less in conflict with a decision of this Court, other Courts of Appeals, state courts, or federal law. To the contrary, the district court's decision is in full accord with controlling decisions of this Court and the Courts of Appeals. The petitioner has merely made factual arguments to this Court, arguments that the lower courts have already properly considered. Moreover, the petitioner, has raised new facts beyond the record for this Court to consider. For these reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MARSHA J. HOPPER
General Counsel for Transit
Management of Southeast
Louisiana, Inc.
6700 Plaza Drive
New Orleans, Louisiana 70127
(504) 248-3857

ROBERT L. CLAYTON
MICHAEL M. DURAN*
SHERRY L. TEW
EDWARD R. WICKER, JR.
MILLING BENSON WOODWARD, L.L.P.
909 Poydras Street, Suite 2300
New Orleans, Louisiana 70112-1010
Telephone: (504) 569-7000

Attorneys for Respondent,
Transit Management of Southeast Louisiana

* *Counsel of Record*